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EDITOR'S NOTE

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No. 86-1042-AFX
Status: GRANTED

Title: City of Lakewood, Appellant
v.
Plain Dealer Publishing Co.

Docketed:
December 23, 1986

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for appellant: Fischer, Henry B.

Counsel for appellee: Garner, James P.

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1986	G	Statement as to jurisdiction filed.
3	Jan 9 1987		Order extending time to file response to jurisdictional statement until February 10, 1987.
4	Feb 10 1987		Brief of appellee Plain Dealer Publishing Co. in opposition filed.
5	Feb 11 1987		DISTRIBUTED. February 27, 1987
6	Feb 25 1987	X	Reply brief of appellant Lakewood filed.
7	Mar 2 1987		PROBABLE JURISDICTION NOTED. *****
9	Apr 1 1987		Order extending time to file brief of appellant on the merits until May 16, 1987.
10	May 15 1987		Brief amicus curiae of National Institute of Municipal Law Officers filed.
11	May 15 1987		Brief amicus curiae of National League of Cities, et al. filed.
12	May 16 1987		Brief of appellant Lakewood filed.
13	May 16 1987		Joint appendix filed.
14	May 28 1987		Record filed.
16	Jun 4 1987		Order extending time to file brief of appellee on the merits until July 17, 1987.
17	Jul 2 1987		Record filed.
18	Jul 17 1987		Brief amicus curiae of American Newspaper Publishers, et al. filed.
19	Jul 17 1987		Brief of appellee Plain Dealer Publishing Co. filed.
20	Jul 17 1987		Brief amicus curiae of ACLU filed.
21	Jul 27 1987		CIRCULATED.
22	Aug 31 1987		SET FOR ARGUMENT. Wednesday, November 4, 1987. (3rd case).
23	Oct 28 1987	X	Reply brief of appellant City of Lakewood filed.
24	Nov 2 1987	X	Supplemental brief of appellee Plain Dealer Publishing Co. filed.
25	Nov 4 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86 - 10 42
No.

Supreme Court, U.S.
FILED

DEC 23 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

HENRY B. FISCHER, *Counsel of Record*

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

(216) 781-1212

WILLIAM E. BLACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

City of Lakewood

12650 Detroit Avenue

Lakewood, Ohio 44107

(216) 521-6580

Attorneys for Appellant

City of Lakewood

December 22, 1986

QUESTIONS PRESENTED

I. Does the First Amendment to the United States Constitution override equal protection requirements and mandate that a municipality must, when renting its property to a private newspaper publisher to erect commercial newsbox vending machines for the advertising and retail sale of newspapers, grant immunity to the publisher from general laws and regulations (e.g., the requirement of liability insurance and architectural review) which are applicable to other fixed retailers of First Amendment protected material (e.g., stores which sell newspapers, bookstores and movie theaters) and which are applicable to other advertising devices (e.g., signs and billboards), and instead treat the publisher like a governmental or quasi-governmental body which erects structures on public property to provide essential public services (e.g., utility poles, street signs, phone booths for emergency calls and bus shelters)?

II. Is the First Amendment to the Constitution of the United States violated by an Ordinance which directs the Mayor of a City to grant or deny rental applications for placement of commercial newsbox vending machines on City property pursuant to detailed and specific terms as to size, location, term, etc., and such other terms and conditions deemed necessary and reasonable by the Mayor when such terms and conditions may not be unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by evidence and subjects all decisions of the Mayor to judicial review under such statutory standards?

III. Is the First Amendment to the Constitution of the United States violated by an Ordinance which provides for review of the design of newsboxes by the City's Architectural Board of Review when the Board's decision is subject to judicial review and, under statutory standards, may not be illegal, arbitrary, capricious, unreasonable or unsupported by evidence?

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No.

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,

Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant, the City of Lakewood, Ohio, appeals from the final judgment of the United States Court of Appeals for the Sixth Circuit, dated July 10, 1986, which held that Sections 901.181(a), 901.181(c)(5) and 901.181(c)(7) of the Codified Ordinances of the City of Lakewood, are unconstitutional as being violative of the First Amendment to the Constitution of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which appears in the appendix hereto, p. A1, *infra*, is reported at 794 F.2d 1139 (1986).*

*At the United States Court of Appeals for the Sixth Circuit, the case of *New York Times Company v. City of Lakewood*, case No. 84-3675, was consolidated with the instant case. On April 30, 1986, the Court of Appeals remanded the *New York Times* case to the District Court with an order to dismiss the case based upon the doctrine of abstention. That decision has not been

(Continued on following page)

The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, dated July 12, 1984, is not reported. It is reprinted in the appendix hereto, p. A25, *infra*.

JURISDICTION

Upon review of the District Court's decision which held that the City of Lakewood's Ordinance regulating the rental of City property for use by newsboxes was constitutional in its entirety, the United States Court of Appeals for the Sixth Circuit, reversed in part, holding three (3) sections of the City's Ordinance to be violative of the First Amendment. The Court of Appeals' judgment was entered on July 10, 1986 [See, appendix, p. A1, *infra*]. Appellee, The Plain Dealer Publishing Company, filed a "Petition for Rehearing and Suggestion for Rehearing *En Banc*" which was denied by the Court on September 25, 1986 [A40].

A Notice of Appeal to this Court was timely filed in the United States Court of Appeals for the Sixth Circuit on December 18, 1986 [A42].

This Appeal is being docketed in this Court within ninety (90) days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2) [See, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); and, *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77 (1958)].

Footnote continued—

appealed from. It is not reported, but it is reprinted in the appendix hereto, p. A20, *infra*. Criminal prosecutions against the New York Times are currently pending in the Lakewood Municipal Court.

1. Appellee requested the Circuit Court to reconsider its determination that the City could: (1) Charge a Ten Dollar (\$10.00) per year, per location rental fee; and, (2) Prohibit newsboxes from being placed in the City's residential districts.

CONSTITUTIONAL PROVISIONS AND CITY ORDINANCES

First Amendment, United States Constitution:

Congress shall make no law * * * abridging the freedom of the press; * * *

Section 901.181(a), Lakewood Codified Ordinances:

The term "newspaper dispensing device" as used in this section, shall mean a mechanical, coin operated container constructed of metal or other materials of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

Sections 901.181(c)(5) and (c)(7), Lakewood Codified Ordinances:

(c) A rental permit shall be granted upon the following conditions:

* * * * *

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation of each newspaper dispensing device and shall furnish, at the permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) com-

bined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

* * * * *

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

STATEMENT OF THE CASE

On January 5, 1983, the Plain Dealer Publishing Company (hereinafter sometimes referred to as "Appellee") filed the within action in the United States District Court for the Northern District of Ohio, Eastern Division, after being denied permission to place its newsboxes on City property, pursuant to §901.18 of the Lakewood Codified Ordinances.²

On or about August 18, 1983, the trial court, upon the Plain Dealer's Motion for Summary Judgment, ruled that the ordinance was unconstitutional. The trial court held the matter of the Plain Dealer's requested permanent injunction for sixty (60) days to give the City of Lakewood an opportunity to enact reasonable regulations concerning the placement of newsboxes on its property.

In response to the trial court's decision, the City adopted two ordinances, one ordinance amending §901.18 and one ordinance enacting a new section, §901.181.

2. Section 901.18 provided: "No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City."

The Appellee objected to certain portions of the new ordinance section, and in response, the City amended §901.181. Appellee was still not satisfied, and filed an Amended Complaint alleging that such newly enacted section was unconstitutional.

With reference to the provisions held unconstitutional by the United States Sixth Circuit Court of Appeals, the District Court held:

1. As to Section 901.181(a)—Provisions of the Lakewood Codified Ordinances provide for architectural review of all structures erected within the City, thereby mandating that newsboxes be subject to architectural review. Exempting newsboxes from such a review would constitute unlawful discrimination and a denial of equal protection to all others erecting structures within the City (pp. A36, A38-A39, *infra*);

2. As to Section 901.181(c)(5)—The City of Lakewood is liable, pursuant to Statutory and Common Law, for negligently maintaining its streets, sidewalks and public ways. It should not be exposed to additional liability without indemnification and insurance, including naming the City of Lakewood as an additional named insured, by persons permitted the right to commercially use City property (pp. A33, A36-A37, *infra*); and,

(3) As to Section 901.181(c)(7)—The regulations and terms as provided by Section 901.181 are reasonable for the rental of City property for private use and are reasonable because of the City's responsibility to keep its rights-of-way free of nuisances (pp. A33-A34, A37, *infra*).

Appellee timely filed its appeal and reiterated its First Amendment claim before the United States Court of Appeals for the Sixth Circuit. The City cross-appealed

the District Court's awarding of costs to the Appellee. The Sixth Circuit Court of Appeals upheld all other provisions of §901.181 (including provisions requiring annual rental applications, payment of rent for the use of City property and excluding newsboxes from residential districts), but overruled the District Court's finding that Sections (a), (c)(5) and (c)(7) were constitutional. The Circuit Court held that these sections are facially violative of the First Amendment. The Court of Appeals upheld the award of costs to Appellee. Judge Unthank concurred in the opinion of the Court except for the holding that the insurance and indemnity requirements violate the First Amendment.

STATEMENT OF FACTS

From the beginning of this case, Appellee has contended that, because it publishes a newspaper, it has a right to take, for its sole and exclusive use and in perpetuity, portions of City property, free of charge and with virtually no regulations, so that it may sell its newspapers from newsboxes.

The City has maintained that, while the First Amendment guarantees a right of equal access to certain portions of public property, it does not guarantee a right to take or appropriate public property, nor does it provide an exemption from generally applicable laws and obligations. Thus, if the Appellee wishes to sell its paper from fixed structures erected on someone else's property, it must be treated like any other fixed retailer of material, First Amendment protected or otherwise.

The subject ordinance sections are generally applicable laws, regulations and business obligations which do not

abridge any of Appellee's First Amendment rights. *First*, part of the cost of doing business for commercial ventures is liability insurance. *Second*, the design of general retail stores, bookstores, advertising signs, billboards and theaters erected within the City are subject to architectural approval. *Third*, no objects can be located on City property if they: unnecessarily block public rights-of-way; detrimentally affect the City aesthetically; or, hinder the City's provision of public services.

The City of Lakewood, Ohio, is the owner of its streets, sidewalks and public ways. It holds its property in trust for the benefit of all its citizens.

All objects currently placed on City sidewalks and/or treelawns may be classified as governmental or quasi-governmental fixtures placed by governmental subdivisions of the state or public utilities pursuant to easements. These objects provide essential public services.

The Plain Dealer is not a subdivision of the state or a public utility, nor does it provide essential public services of a governmental or quasi-governmental nature.

Objects lawfully located on the sidewalks and treelawns of the City of Lakewood consist of: trash receptacles; utility and other poles for street lights, telephone and electric service to the City's residents, traffic lights and street signs; bus shelters; and, public telephone booths. All of the above items provide essential public services (e.g., traffic control and safety; shelter; telephone booths (few in number) as part of the City's emergency communications network and offering free emergency calls to police, etc.; and, utility poles and other fixtures as part of the transmission facilities necessary for providing the aforementioned essential services).

In contrast, Appellee's newsboxes have no relationship to the public safety or welfare. They merely sell newspapers at their retail rate, and, by design, serve as advertisements for the publisher.—Indeed, they further the monetary interests of the publisher even if passers-by do not purchase papers from them.

Newspapers may be distributed by numerous alternate, and adequate, channels of communications, to-wit: by direct home delivery;³ by mail; and, by retail sale—24 hours a day, seven days a week—from newsboxes located on private property within the City's commercial zones⁴ or from businesses within the City.⁵

The City of Lakewood is required by Ohio Revised Code §723.01 to regulate and maintain its sidewalks, tree-lawns and public ways. These public areas must be kept open, in good repair and free of nuisance. The City can be sued and held liable for injury to persons or property caused by a newsbox (e.g., a child falling on a sharp corner of a newsbox). Most commercial rental or lease agreements require the tenant to provide liability insurance and/or to indemnify the owner against claims arising from the tenant's use of the owner's property.

Pursuant to the Lakewood Building Code, structures erected or remodeled within the City are subject to architectural review. The City and the businesses located therein have spent millions of dollars to maintain property values, revitalize the commercial districts and preserve

3. Home delivered newspapers constitute 77% of the newspapers sold by Appellee.

4. All residents of the City of Lakewood live within one-quarter (1/4) mile of an existing, non-regulated newsbox.

5. There are eleven "all-night" businesses within the City and two "all-night" businesses adjacent to the City that sell newspapers 24 hours a day, seven days a week.

the local tax base. This has been done by way of federally and locally funded programs, such as the City's storefront renovation program.

Objects similar in size and function to newsboxes, advertising, business, directional and/or other informational signs, such as must be approved by the Board of Architectural Review. Similarly, all new structures, such as homes, theaters or bookstores, are subject to the same architectural review standards applicable to newsboxes.⁶

As provided in §901.181, the Mayor must grant a permit for rental of City property when the applicant complies with the ordinance. The Mayor cannot refuse to issue a rental permit except for reasons of health and safety. Evidence to this effect was offered at trial. However, some discretion is necessary. Unfortunately, the Lakewood City Council is not omniscient. It cannot foresee all potential hazards of all proposed newsbox sites. Indeed, as pointed out at trial, the subject ordinance fails to address the placement of newsboxes in ramps for the handicapped (such access ramps are built into the City's sidewalks). Thus, some flexibility is needed in managing City property and in reviewing proposed newsbox locations.

Should an applicant be dissatisfied with the decisions of either the Mayor or Architectural Board of Review, he may appeal to the courts pursuant to Ohio Revised Code

6. Section 1323.03 of the Lakewood Codified Ordinances provides:

The purposes of the Architectural Board of Review are to protect the value, appearance, and use of property on which buildings are constructed or altered to maintain a high character of community development, to protect the public health, safety, convenience, and welfare, and to protect real estate within the City from impairment of destruction of the values.

§2506.01, et seq. If the decision of either the Mayor or Board is found to be arbitrary, capricious, unreasonable, unconstitutional and/or unsupported by the evidence, it will be reversed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should hear this case and render a definitive decision because ordinances establishing the terms and conditions under which newsbox vending machines may be placed along public streets have been, and are being, enacted by municipalities, and such ordinances have been, and are being, challenged in numerous state and federal courts across the country. There is a need for a definitive statement by this Court to allow for certainty in planning and promulgating regulations for equal access and use of public property by all citizens.

A newsbox placed at a particular site uses, occupies and takes City property in perpetuity until its owner decides, or is compelled, to remove it. It is normally chained to a fixed object (such as a fire hydrant) or a concrete block is put into its base so as to keep it in one fixed location. The dimensions of a newsbox are 49" high x 19" wide x 16-1/4" deep and its occupation of space necessarily dispossesses all others (including those who would exercise their First Amendment rights) from that portion of public property it takes.

In *City of St. Louis v. Western Union Telegraph Company*, 148 U.S. 92 (1893),⁷ the Court held that the

7. This case, and its definition of "taking", was cited with approval in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, property was found to have been "taken" when 36 feet of cable, 1/2" in diameter, and two 4" x 4" x 4" metal boxes were placed on an apartment building. It was held that a "taking" is not dependent upon the size of the area permanently occupied (*Id.* at 436).

City's property was "taken" by the Telegraph Company's placement of telegraph poles on City property because:

The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveler, whether on foot or in a vehicle passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. . . . But, the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public.

Id. at 99 (emphasis added). A newsbox located on City property, just like a telegraph pole, ". . . permanently dispossesses the general public as if it had destroyed that amount of ground."

In this case, Appellee has sought to take City property to erect newsboxes under the guise of an alleged First Amendment right. It has done so by relying on cases that deal with the rights of citizens to transiently disseminate information. However, the permanent property rights sought by Appellee are not the equivalent of the right of transient access to public property as defined by traditional First Amendment analysis.⁸

8. *Lovell v. City of Griffin*, 303 U.S. 444 (1937) is the quintessential "transient" free speech case. But the interest in-

(Continued on following page)

In *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the difference between a citizen transiently disseminating information and "speech" left unattended on city streets was recognized. In distinguishing door-to-door solicitation from posting political signs on city property, this Court held:

The rationale of *Schneider* is inapposite. . . . There individual citizens were actively exercising their right to communicate directly with potential recipients of their message. *The conduct continued only while the speakers or distributors remained on the scene. In this case, Appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed.*

Id. at 809 (emphasis added). If there is no First Amendment right to post temporary political signs on public property, there can be no First Amendment right to permanently take City property for the erection of vending machines, whether it be by chaining a newsbox to a city fire hydrant or otherwise.

It is fundamental law that the Constitution of the United States does not create property rights, "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an inde-

Footnote continued—

involved in *Lovell* is quite different than the interest involved in the instant matter. The *Lovell* case dealt with Alma Lovell distributing, peripatetically, a pamphlet and/or magazine. Ms. Lovell did not seek to appropriate public property in perpetuity to erect structures for the sale of her published material. Traditional First Amendment analysis of access to public property has dealt with the temporary use of such property for leafletting, pamphleteering, picketing, proselytizing, etc. Such cases are inapposite to appropriating, and erecting a structure on, City property.

pendent source such as state law. . . ." *Board of Regents v. Roth*, 408 U.S. 564, at p. 577 (1972) [See also, *Cleveland Board of Education v. Loudermill*, 470 U.S. . . ., 84 L. Ed. 2d 494 (1985); *Vitek v. Jones*, 445 U.S. 480 (1980); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. David*, 424 U.S. 693 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); and, *Perry v. Sindermann*, 408 U.S. 593 (1972)]. Thus, while the First Amendment protects the right of access to portions of City property for transiently disseminating information, it does not grant a property right in City property to Appellee, allowing Appellee to exclude all others from that property and erect a structure from which to sell papers and magazines.

The Lakewood Codified Ordinance Section at issue is the only authority permitting Appellee to apply for such a property interest in City property. The Circuit Court recognized that Appellee has no "First Amendment Property Right" in City property by holding that the City can charge Ten Dollars (\$10.00) per year, per newsbox location, for rent.

The City is under no obligation to grant property rights for newsboxes [*Perry v. Sindermann, supra*, at p. 597]. Once such an interest is created, as held below, the City can place reasonable conditions on such a property right. However, the City cannot deny or terminate this property right on conditions which abridge Appellee's First Amendment rights (*Id.* at p. 597). A review of the many cases concerning the denial or termination of governmentally created property rights (or "benefits") on conditions which abridge First Amendment rights reveals that, unlike this case, the alleged "abridgements" are based on, or related to, the content of speech, or political or religious beliefs [See, *Speiser v. Randall*, 357 U.S. 513 (1958); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Pickering v. Board*

of Education, 391 U.S. 563 (1968); *Board of Regents v. Roth*, supra; *Perry v. Sindermann*, supra; *Elrod v. Burns*, 427 U.S. 347 (1976); *Mount Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); and, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)].⁹ The ordinal conditions for denying or terminating the property right created by the City in this case have nothing whatsoever to do with the content of Appellee's newspaper.

As to the condition of indemnifying the City and providing liability insurance,¹⁰ the Lakewood City Council has merely refused to expend taxpayer's funds to pay for the risks involved in Appellee's placement of newsboxes on City property for a commercial, nongovernmental and strictly private use. As Appellee's newsboxes are fixed retailers, Appellee should bear this expense of doing business, just as any bookstore or theater must do.

9. This is the first case Appellant is aware of where an entity claims a First Amendment right to take public property for its sole and exclusive use, free of charge and immune from generally applicable regulations and obligations. Cases dealing with the sole and exclusive use of government property [e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Heffron v. International Society for Krishna Consc.*, 452 U.S. 640 (1981); and, *Los Angeles v. Preferred Communications*, 476 U.S., 90 L. Ed. 2d 480 (1986)] are devoid of such claims. In *Southeastern*, petitioner did not claim a right to use the theater free of charge and free from generally applicable regulations, but was prepared to lease the theater (*Id.* at p. 551, n.6). Similarly, in *Heffron*, petitioner rented a booth from which to sell and/or distribute its information (452 U.S., at p. 644). In the *Preferred Communications* case, respondent attempted to lease space on utility poles (90 L. Ed. 2d, at 458). Nothing in these cases indicates that generally applicable laws, regulations and obligations (e.g., building codes, fire codes, requirements concerning liability insurance, etc.) would have been facially violative of the First Amendment.

10. It should be noted that Appellee already has certificates of insurance covering its newsboxes in the amount of One Million Dollars (\$1,000,000.00). This amount far exceeds the amount required by the subject ordinance.

It is basic Constitutional law that a governmental unit is not required to subsidize a claimed First Amendment right, such as paying for the cost of the risks caused by newsboxes on City property [See, *Cammarano v. United States*, 358 U.S. 498 (1959)]. To paraphrase *Regan v. Taxation with Representation*, 461 U.S. 540 (1983):

[In this case], as in *Cammarano*, [City Council] has not infringed any First Amendment rights or regulated any First Amendment activity. [City Council] has simply chosen not to pay for [the cost of the risks generated by Appellee's activities]. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state".

Id. at 546 (citations omitted).

Apparently, the Circuit Court, in its holding, was implying that, because other objects on the treelawns and/or sidewalks of the City are not required to be insured, it is unlawful to require newsboxes to be insured. Although not being denoted as such, it is assumed that this holding is based on an equal protection argument.¹¹

First, it should be noted that there is no evidence in the record as to whether the other objects located on the City's treelawns and sidewalks are required to have insurance. Second, and more importantly, is the fact that publishers are not "similarly situated" to the entities which currently have objects on the City's sidewalks and treelawns.

11. What is ironic about this holding, which was unsupported by legal authority, is that no other entity, public or private, has been granted the right to place structures on the City's sidewalks and treelawns in order to sell merchandise. Only publishers have been granted this right.

As stated by Judge Unthank in his concurring opinion, the insurance or indemnity requirements do not violate the First Amendment because they are "legitimate and reasonable provisions for the protection of the City from liability", *infra*, at p. A19. Judge Unthank also touched upon the fact that Appellee is different from the other entities currently owning objects located on the City's public ways: "The fact that the City does not require insurance from public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services", *infra*, at p. A19.

Equal protection necessarily relates to the judging of classifications by law. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same [See, *Tigner v. Texas*, 310 U.S. 141, 147 (1940)]. The mere fact that a law classifies does not void the law. In the exercise of its powers, a legislature has considerable discretion in recognizing the differences between and among persons and situations [See, *McGowan v. Maryland*, 366 U.S. 420 (1961); *Schilb v. Kuebel*, 404 U.S. 357 (1971); and, *Barrett v. Indiana*, 229 U.S. 26 (1913)].

For there to be an illegal classification, the classification must relate to persons similarly situated. In the case *sub judice*, Appellee is not similar, and the service provided by the items it proposes to place on City property are not similar, to the owners of items on City property and the essential public services those items provide. Therefore, the City may validly classify, and treat differently, Appellee and the current occupiers of City property.

As to the condition requiring architectural review of newsboxes, all new structures within the City of Lake-

wood are subject to such architectural review. The Circuit Court held, unsupported by citations, that §901.181 (a) is facially violative of the First Amendment because it gives the Architectural Board of Review standardless discretion to approve the design of newsboxes.

Contrary to the Circuit Court's holding, limitations on the Board's discretion are found in §1323.03 of the Lakewood Codified Ordinances. It is not necessary that there be further written specifications as to how new structures erected within the City are to be designed.¹² New theaters and bookstores erected within the City are subject to the exact same architectural review as the newsboxes that would be placed on the sidewalk in front of them.

Moreover, this same issue has already been decided by the Ohio State Courts. In *Reid v. Architectural Board of Review*, 119 Ohio App. 67 (Cuyahoga Cty. App. Ct., 1963), an ordinance almost identical to §1323.03 was held to contain all of the criteria and standards reasonably necessary for the Board to carry out its duties. *Id.* at p. 70.

As can be seen, requiring the design of newsboxes to be reviewed by the Architectural Board of Review is a law generally applicable to all structures erected within the City of Lakewood. As held in *Associated Press v. NLRB*, 301 U.S. 103 (1937):

12. The Board, instead, relies upon professional architects, who are members of the Board, to apply professional architectural standards. Having stringent written guidelines as to the design of structures would necessarily curtail construction within the City and unnecessarily constrain the design of such structures. Therefore, the City has, consciously and purposely, refrained from issuing such written guidelines.

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

Id. at 132 [See, also, *Young v. American Mini Theaters*, 427 U.S. 50 (1976): "The mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances". *Id.* at 62]. Thus, the Circuit Court erred in holding that the corporation's structures are "immune" from this generally applicable law.

As to the condition of the Mayor approving rental permits, the Ordinance and the law of Ohio do not allow the Mayor to wield limitless discretion.

The Circuit Court held that the Mayor is vested with virtually standardless discretion as to the granting of a rental permit. This holding is clearly erroneous. As offered at trial, the Mayor can only refuse an application for a rental permit based on health and safety reasons. Unfortunately, the City of Lakewood cannot foresee all possible health and safety hazards presented by the placement of newsboxes on public property. Testimony at trial evidenced the fact that the subject ordinances failed to address the dangers of placing a newsbox within ramps for the handicapped. Thus, it is necessary for the Mayor to have some discretion in approving various proposed locations for newsboxes.

The decisions of both the Mayor and the Architectural Board of Review are subject to the standards set forth in

Ohio Revised Code §2506.04; to-wit: their decisions may not be "... unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record." (O.R.C. §2506.04, *infra*, at p. A50). The Circuit Court ignored these standards.

Furthermore, such decisions are subject to damage claims under 42 U.S.C. §1983. Accordingly, neither the Mayor nor the Architectural Board of Review have "unbridled" discretion and the "due process" rights of applicants are adequately protected [See, *Parratt v. Taylor*, 451 U.S. 527 (1981); and, *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, U.S., 105 S. Ct. 125 (1984)].

As none of the conditions placed on Appellee's rights to use City property is content based and as Appellee is not immune from general laws and regulations applicable to other fixed retailers and advertisers, the Circuit Court decision as to §901.181(a), (c)(5) and (c)(7) should be reversed and the District Court's decision reinstated.

Finally, the holdings of the Circuit Court are especially unfair to the City of Lakewood because the City was not permitted to present evidence offered on the underlying issues at trial.

CONCLUSION

For these reasons, this Court should give plenary consideration to this appeal.

Respectfully submitted,

HENRY B. FISCHER, *Counsel of Record*
 JOHN H. GIBBON
 FREDERICK W. WHATLEY
 WALTER, HAVERFIELD, BUESCHER
 & CHOCKLEY
 1215 Terminal Tower
 Cleveland, Ohio 44113
 (216) 781-1212

WILLIAM E. BLACKIE
Law Director
 ROGER D. TIBBETTS
Assistant Law Director
 City of Lakewood
 12650 Detroit Avenue
 Lakewood, Ohio 44107
 (216) 521-6580
Attorneys for Appellant
City of Lakewood

December 22, 1986

APPENDIX A

**Opinion of the United States Court of Appeals
 For the Sixth Circuit**

(Filed July 10, 1986)

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-3683 & 84-3722

**UNITED STATES COURT OF APPEALS
 FOR THE SIXTH CIRCUIT**

PLAIN DEALER PUBLISHING CO.,
Plaintiff-Appellant,
Cross-Appellee,

vs.

CITY OF LAKEWOOD,
Defendant-Appellee,
Cross-Appellant.

**ON APPEAL From the United States District Court
 For the Northern District of Ohio.**

Decided and Filed July 10, 1986

Before: KEITH and KENNEDY, Circuit Judges; and
 UNTHANK*, District Judge.

KEITH, Circuit Judge, delivered the opinion of the court in which KENNEDY, Circuit Judge, joined. UNTHANK, District Judge, (p. 18) delivered a separate concurring opinion.

*Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

KEITH, Circuit Judge. Appellant Plain Dealer Publishing Company challenges the constitutionality of a municipal ordinance that regulates the placement of newspaper dispensing devices ("newsracks") on the city streets of Lakewood, Ohio. Plain Dealer filed the instant action against the City of Lakewood ("City") after being denied permission to place its newsracks on City property pursuant to Section 901.181 of the Lakewood Codified Ordinances, as amended. On July 12, 1984, the district court entered judgment for the City with court costs assessed against the City. For the following reasons, we affirm in part and reverse in part.

I.

FACTS

The Plain Dealer daily newspaper is distributed as a publication of general circulation throughout the Cleveland Metropolitan area and Ohio. Generally, Plain Dealer daily newspaper sales are 77 percent by home delivery through carriers and 80 percent on Sundays by home delivery. The balance of the sales are by single copy through retail outlets and coin-operated vending boxes, the latter constituting 4.6 to 5.27 percent of total sales.

The City of Lakewood is approximately 5.5 square miles. It is an older residential community located in Cuyahoga County, Ohio, west of Cleveland. In 1980, the population of the City was 61,963. Lakewood has historically been a city of homes. The commercial areas of the City are located essentially along Madison and Detroit Avenues, conveniently close to all residential areas of the City. There is no area within the City more than one-quarter mile from an all-night newspaper outlet.

In May 1982, Plain Dealer sought permission from the City Law Director to place coin-operated newsracks at sites within the City. The various sites included the commercial areas along Madison and Detroit Avenues and the residential areas along Clifton Boulevard. The City Law Director denied the request citing Section 901.18 of the Lakewood Codified Ordinances which provided at that time:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

Plain Dealer filed suit eight months later on January 5, 1983, attacking the constitutionality of Section 901.18. On August 18, 1983, the district court granted plaintiff's motion for summary judgment ruling the ordinance provision was an unconstitutional exercise of police power, and that it banned a reasonable means of newspaper distribution. The court held the issuance of a permanent injunction in abeyance for sixty (60) days in order to give the City an opportunity to enact constitutional provisions regulating placement of newsracks on public property.

On October 17, 1983, the City amended Section 901.18 to permit erection of a structure on public property with the consent of the City where permitted by city or state law. Under the amended ordinance, Plain Dealer would have to apply to the Mayor for a rental agreement or permit. After initial enactment of the amended ordinance, the City reexamined Plain Dealer's objections to the ordi-

nance and on January 3, 1984, again amended the ordinance. Section 901.181,¹ as amended, provides that the

1. 901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01, Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(Continued on following page)

Mayor may grant a rental permit application upon payment of a \$10.00 rental fee for each site, submission of a certificate of insurance and compliance with the appearance and architectural standards set by the Architectural

Footnote continued—

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide

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Board of Review ("the Board"). Under subsection (c) (7) of the amended ordinance, however, the Mayor may subject an application to any additional conditions he or she deems necessary. The amended code would permit Plain Dealer, upon application, to place newsracks at locations it requested on Madison and Detroit Avenues in the commercial district, but not along Clifton Boulevard in the residential use districts.

After the City had amended the regulatory scheme twice, Plain Dealer filed its amended complaint challenging the constitutionality of the regulatory scheme. Trial was scheduled on April 11, 1984, to hear Plain Dealer's request for a preliminary and permanent injunction.

There was evidence at trial that although Plain Dealer made no application for a permit, it had intended to place

Footnote continued—

that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

newsracks at eighteen locations in Lakewood, eight of which were located in residential districts on Clifton Boulevard. The district court concluded the amended ordinances were constitutional and entered judgment for the City. On appeal, Plain Dealer argues that Sections 901.18 and 901.181 should be declared unconstitutional because they impose prior restraints on the freedom of press by requiring permits and the payment of rental fees, absolutely ban newsracks in residential districts, and impose unduly burdensome procedures for compliance. Essentially, this appeal analyzes the constitutionality of the Mayor's power to grant or refuse permits, the constitutionality of the Board's power to approve the designs of newsracks, the insurance requirement and the absolute ban in residential districts of newsracks.² We reverse the district court decision in part because Sections 901.18 and 901.181 unconstitutionally give the Mayor unlimited discretion in denying permits; unconstitutionally provide the Board with standardless discretion in approving newsrack designs; and unconstitutionally require applicants to provide insurance to the City. However, we affirm the remainder of the district court's decision, specifically holding constitutional that part of the ordinance banning newsracks in all residential areas.

2. However, we do not specifically discuss each issue raised by Plain Dealer because they are not dispositive of the ultimate determination of this case. For example, we believe the imposition of a rental fee withstands constitutional scrutiny.

II.

ANALYSIS OF ORDINANCE

A. *Provision Giving Mayor Unbridled Discretion To Grant Or Deny Permit Is Unconstitutional*

The right to distribute newspapers by means of newsracks is protected by the First Amendment to the United States Constitution. *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984); see *Lovell v. City of Griffin*, 303 U.S. 444 (1938); see also *Hull v. Petrillo*, 439 F.2d 1184 (2d Cir. 1971). However, the State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant interest, and leave open ample alternative channels of communication. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) (citations omitted). Laws which vest municipal officials with unguided discretion to grant or deny a newsrack license or permit "do not regulate with [the] narrow specificity" required by the First Amendment. *Association of Community Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colorado*, 744 F.2d 739, 746 (10th Cir. 1984). The Supreme Court in *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984), stated:

But even if the Secretary were correct, and the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship

that by its very existence chills free speech Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. at 964 n. 12 (citations omitted); See also *Fernandes v. Limmer*, 663 F.2d 619, 631 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (holding unconstitutional ordinance that gave executive director excessive discretion in deciding whether the grant of a permit would be detrimental to the public). Thus, in order to qualify as narrowly tailored, a content neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses, for

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); See also *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969).

In *Staub*, the Supreme Court struck down an ordinance under which the Mayor and the City Council had the discretion to grant or deny a permit. 355 U.S. at 321. The Court held that the ordinance on its face imposed an unconstitutional prior restraint because it authorized the Mayor and the Council to refuse or to grant a permit in

their uncontrolled discretion. *Id.* at 325. Similarly in *Shuttlesworth*, the Supreme Court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit.

We find that the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion. Section 901.181(c)(7) provides that a rental permit is granted upon "terms and conditions deemed necessary and reasonable by the Mayor." It is clear from subsection (c)(7) that the Mayor is vested with unlimited discretion to grant or deny a permit and make it subject to almost any conditions he may choose. Furthermore, although the language of the ordinance limits the conditions under which the Mayor may grant a permit, it does not contain any standards for the Mayor to use when denying a permit. Consequently, the ordinance's restriction is not narrowly tailored to serve a significant government interest. See *Shuttlesworth*, 394 U.S. 147.

The Supreme Court has repeatedly struck down ordinances which condition the exercise of First Amendment activities on the broad discretion of local officials, resulting in virtually unreviewable prior restraints on First Amendment rights. *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948). When a city allows an official to ban a means of communication through uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. *Saia*, 334 U.S. at 562.³ The

3. *Saia* involved a city ordinance which prohibited the use of a sound amplification device without the permission of the police chief. Other licensing systems which are similar have

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constitutional problem here lies in the very existence of such unfettered discretion.

The City argues that the Mayor can refuse a permit only "upon health and safety reasons." Although municipalities may enact laws in furtherance of the public health and safety, the City is incorrect in its argument for two reasons. First, no language appears in the ordinance specifically limiting the Mayor's power to refuse a permit for health and safety reasons.⁴ The district court ruled the City's evidence of such a standard was inadmissible. Second, if health and safety or other legitimate concerns are what the City seeks to address, the language of the ordinance should be limited accordingly. See *Wulp v. Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972). An ordinance providing for unguided governmental discretion is inherently inconsistent with a valid time, place and manner regulation because it provides for potential suppression of a particular point of view. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

The district court held that application and appeal procedures pursuant to Section 901.181(e) and Ohio Revised Code Chapter 2506 provide an adequate remedy for any wrong alleged by Plain Dealer.⁵ The "adequate state

Footnote continued—

been held unconstitutional prior restraints on speech because they vest broad discretion in granting or withholding a permit upon broad criteria unrelated to proper regulation of public places. See *Shuttlesworth v. City of Birmingham*, 394 U.S. at 153; See also *Kunz*, 340 U.S. 290.

4. Section 901.181(b) states that in determining the location of the newsracks the Mayor should not cause an undue health or safety hazard. However, the language does not state that the Mayor can only refuse a permit for health and safety reasons.

5. The district court relied upon *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983).

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remedies" include the application for a permit, appeal to City Council and appeal to the court of common pleas under Chapter 2506 of the Ohio Revised Code. However, these procedures require Plain Dealer to apply for a permit and appeal any denial prior to placing newsracks on the sidewalks and subject acquisition of the permit to standardless administrative discretion. The fact that the ordinance provides an appeal process does not cure the unconstitutionally broad discretion it accords the Mayor to impose prior restraints on First Amendment rights. Consequently, the district court erred in concluding that these remedies are adequate.

The City argues that under the holdings of *Greer v. Spock*, 424 U.S. 828 (1976), and *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984), Plain Dealer cannot attack the ordinance because the newspaper has never applied for a permit. We are not persuaded by this argument. In *Greer*, the Supreme Court upheld Fort Dix regulations banning partisan political speeches and demonstrations and prohibiting the distribution of any literature without the prior written approval of a commanding officer. An Army regulation specified that the commander could only disapprove publications presenting an apparent danger to military morale, loyalty or discipline. *Id.* at 840. The Court in *Greer* specifically considered the facial validity issue and held that the regulations at issue were constitu-

Footnote continued—

cert. denied, ___ U.S. ___, 105 S.Ct. 125 (1984), which hold that actions for money damages cannot be brought under 42 U.S.C. Section 1983 if there are adequate remedies at state law. However, these cases are distinguishable to the instant case in that this case is not an action for money damages under Section 1983. It is an action for declaratory and injunctive relief from an ordinance which allegedly abrogates First Amendment rights.

tional on their face because they applied to a federal military reservation, not a traditional public forum. *Greer*, 424 U.S. at 838. Having found the regulations facially valid, the Court held that it would not reach the question of unconstitutional application because no approval had been sought from the appropriate authorities. In the instant case, Plain Dealer challenges the facial validity of Lakewood's ordinances and does not rely on a claim of unconstitutional application. Accordingly, *Greer* is not contrary to Plain Dealer's position.

In *Gannett Satellite Information Network, Inc., supra*, after holding that the Metropolitan Transportation Authority's ("MTA") unregulated licensing scheme for the placement of newspaper vending machines in MTA commuter stations violated the First and Fourteenth Amendments, the district court ordered the adoption of reasonable standards governing the issuance and terms of licenses. The Second Circuit reversed, holding, in part, that MTA need not adopt such guidelines at that time. The court of appeals questioned whether the Gannett company could require the MTA to establish standards governing the issuance of licenses stating:

But there is no evidence or finding that MTA has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct. It is doubtful that this record presents a justiciable controversy with respect to the reasonableness of the licensing terms. Therefore, while guidelines might be helpful, we will not require them at this time.

Id. at 776. However, in this case, the City has issued regulations the validity of which is directly challenged by Plain Dealer. Moreover, subsection (c)(7) of those regu-

lations permits, on its face, unbridled discretion and therefore an inherent threat of arbitrary decision making. Since *Gannett* did not involve a facial challenge to adopted licensing requirements, it is inapplicable to this instant case.

B. *Provision Granting the Architectural Board of Review With Standardless Discretion Is Unconstitutional*

The provision requiring the Board to approve the design of newsracks is unconstitutional under a time, place and manner analysis because the provision is not narrowly tailored to serve a significant governmental interest. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). In essence, the provision gives the Board standardless discretion to approve the design of newsracks. The City claims that Section 1325.03 of the Lakewood Codified Ordinances provides the Board with adequate standards. Section 1325.03 allows the Board to regulate the construction or alteration of buildings according to "accepted and recognized architectural principles". A newsrack, however, is not a building. The Chairman of the Architectural Board admitted at trial that the Board had no standards for approving or disapproving the design of newsracks. Since the ordinance contains no standards to guide the Board in approving or rejecting newsrack designs, we hold that provision unconstitutional under the First and Fourteenth Amendments.

C. *Provision Requiring Indemnification Before Access to Public Streets and Sidewalks Is Unconstitutional*

On appeal Plain Dealer also challenges the constitutionality of Section 901.181(c)(5) of the Lakewood Codified Ordinance requiring that "permittees" indemnify and insure the City as a condition to gaining access to its public

streets and sidewalks.⁶ We believe this provision also violates the First Amendment.

The district court held that since the City is liable under Ohio Revised Code Section 723.01 for the failure to maintain the streets, sidewalks, and publicways, it should not be exposed to additional liability without indemnification by any private commercial use on such City owned property. The district court cites *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26, 442 N.E. 2d 749 (1982) (holding that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in a negligence action); *Dickerhoof v. City of Canton*, 6 Ohio St. 3d 128, 451 N.E. 2d 1193 (1983) (holding that a municipal corporation may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair); and *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (holding that the National Labor Relations Act does not unconstitutionally abridge the freedom of the press in that it does not interfere with the right to discharge any employee for any proper cause) as authority for the above proposition. However, these cases are inapposite in that none of them discusses insurance or indemnification. They stand only for the general proposition that 1) local governments retain power to indemnify themselves, *Haverlack*, 2 Ohio St. 3d at 30; 2) local governments may be liable for negligence in maintaining the streets, *Dickerhoof*, 6 Ohio St. 3d at 131; and 3) news organizations are subject to

6. Section 901.181(c)(5) provides that a newspaper box "permittee" must indemnify the City for all liability "for any reason whatsoever occasioned upon the installation and use" of a newspaper box. Furthermore, the ordinance requires the permittee to provide property damage and personal injury insurance in the amount of \$100,000, naming the City as an insured.

overall regulations and laws and are not entitled to special privileges. *Associated Press*, 301 U.S. at 132-33. The City does not require other permittees to provide insurance. For example, neither the bus nor telephone companies are required to insure bus shelters or telephone equipment. Since the City cannot impose more stringent requirements on First Amendment rights than it does on others, we believe the indemnification aspect of the ordinance places an undue burden on Plain Dealer.

D. Ban Of All Newsracks In Residential Areas Is Constitutional

The state may enforce time, place and manner regulations which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

We find that the City's total ban of newsracks in residential areas is a constitutional time, place and manner regulation. First, the ordinance is content-neutral because it bans *all* newsracks in residential areas of the City. Second, the ordinance is narrowly tailored to serve a significant government interest. We agree with the district court's holding that "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." See *Metro Media, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (plurality opinion). Finally, the ordinance leaves open ample alternative channels of communication. For example, the City admits that a person may sell newspapers by mail

or by direct home delivery in residential areas free from governmental interference. Moreover, there are eleven sites within the City, and two sites immediately adjacent to the City, where newsracks are located on private property within commercial zones. In fact, all residences in the City are within one quarter of a mile from an existing newsrack. Furthermore, there are eleven "all-night" businesses within the City and two "all-night" businesses adjacent to the City which sell the Plain Dealer 24 hours a day, seven days a week. Thus, the City's total ban of newsracks in residential districts is a constitutional time, place and manner regulation. We also agree with the District Court that the remaining provisions of ordinances are not unconstitutional.

III. SEVERABILITY

The Supreme Court has held that invalid portions of a statute should be severed unless it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not. *INS v. Chadha*, 462 U.S. 919, 931 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. *Chadha*, 462 U.S. at 934. When the unconstitutional portions of the ordinance dealing with the Mayor's unlimited discretion in denying permits, the Board's standardless discretion in approving newsrack designs, and the insurance requirements for proposed applicants are deleted from the remaining portion of the ordinance dealing with newsracks in commercial areas, what is left cannot stand on its own. Consequently, the portion of the ordinance regulating newsracks in

commercial areas must be held unconstitutional. The remaining portion of the ordinance banning newsracks in residential areas, however, survives as a workable ordinance because it is fully operable as a law. Since prior ordinances under the City's regulatory scheme sought to ban *all* newsracks under all circumstances, we believe this indicates clear legislative intent to ban newsracks in residential areas. Consequently, we sever the ordinance's unconstitutional provisions and hold that the City may constitutionally ban newsracks in residential areas.

IV.

CROSS APPEAL FOR COSTS

The final issue is whether the district court abused its discretion in awarding costs to appellant Plain Dealer. The City argues that the district court committed reversible error by denying its requests for costs without stating reasons. In view of our disposition of the case on appeal, the district court's award of costs to Plain Dealer is not erroneous. Furthermore, to prevail on cross-appeal, Lakewood must show more than error. We review decisions awarding costs under an abuse of discretion standard. *Owen v. Modern Diversified Industries, Inc.*, 643 F.2d 441 (6th Cir. 1981); see also *Missouri Pacific Railroad Company v. Star City Gravel Company, Inc.*, 592 F.2d 455 (8th Cir. 1979). Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling only if it finds that the ruling was arbitrary, unjustifiable or clearly unreasonable. See *NLRB v. Guernsey-Muskingum Electric Co-operative, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). In the instant case, the City amended the ordinance twice in response to a lawsuit by Plain Dealer. Specifically, the district court granted

the Plain Dealer's motion for summary judgment on its initial complaint. No appeal was taken from that decision. Since the City has failed to show that the ruling in this case was arbitrary or unreasonable, the district court did not abuse its discretion in awarding costs to Plain Dealer.

Accordingly, the decision of the district court is affirmed in part and reversed in part consistent with the analysis of this opinion.

UNTHANK, District Judge, concurring. I concur in the opinion of the Court with the exception of the holding that the insurance or indemnity requirements of the Lakewood ordinance violate the First Amendment. I consider them legitimate and reasonable provisions for the protection of the City from liability. The fact that the City does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services.

APPENDIX B

Opinion of the Court of Appeals for the Sixth Circuit
In Case No. 84-3675

(Filed April 30, 1986)

NOT FOR PUBLICATION
84-3675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEW YORK TIMES COMPANY,
Plaintiff-Appellant,

vs.

CITY OF LAKEWOOD,
Defendant-Appellee.

On Appeal from the United States District Court
For the Northern District of Ohio.

BEFORE: KEITH and KENNEDY, Circuit Judges; and
UNTHANK*

PER CURIAM: Appellant, The New York Times ("The Times"), appeals an order of the district court denying a preliminary injunction against the City of Lakewood ("City"). The Times filed this action against the City for declaratory and injunctive relief to establish The Times' First Amendment right to distribute newspapers on City streets by means of coin-operated news-

*Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

racks. For the following reasons we vacate the district court's judgment denying appellant's motion for preliminary injunction and remand the case to the district court to be dismissed without prejudice under the doctrine of abstention.

I.

The appellant is the publisher of The New York Times, a newspaper of general circulation, with readership throughout the United States. In January of 1984, the Times began an effort to broaden the distribution of the national edition of the Times in the Cleveland area. The City of Lakewood is located immediately to the west of Cleveland. The ordinances of the City of Lakewood prohibit placement of newsracks in any residential use district, including the City's principal street, Clifton Boulevard. Section 901.181 of the City Ordinances also requires a permit and rental fee before a newspaper box is placed anywhere else in the City. Despite knowledge of these ordinances, the Times placed newsracks on Clifton Boulevard.

This action commenced after the City seized newsracks placed by the Times along Clifton Boulevard and after the City filed forty-two criminal complaints accusing the Times of violating City zoning and licensing ordinances that ban newsracks in all residentially zoned areas of the City. This action was consolidated with *Plain Dealer Publishing Company v. City of Lakewood*, which involved similar questions of law and fact. The trial of *Plain Dealer* and the Times' motion for preliminary injunction were both heard on the merits.

On July 12, 1984 the district court entered judgment for the City in the *Plain Dealer* case. The court held

that all the relevant City ordinances were constitutional and entered judgment for the City. On the basis of the findings of fact and conclusions of law in the *Plain Dealer* case, the district court found that there was no probability that the Times would succeed on the merits of its suit. Therefore, the court denied the Times' motion for preliminary injunction.

II.

The issue on appeal concerns the constitutionality of Sections 902.18, 901.181 and 901.99 of the Codified Ordinances of the City of Lakewood regarding the placement of newsracks in residential districts. The Times argues that the "public forum" doctrine requires this Court to reverse the district court decision for the City. Under the doctrine of abstention, we vacate the district court's judgment.

The doctrine of abstention permits federal courts to decline or postpone the exercise of jurisdiction pending the state court's opportunity to decide the case. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, *reh'g. denied*, 426 U.S. 912 (1976). However, abstention is a narrow and extraordinary exception to the duty of the federal courts to adjudicate matters which are correctly before them. *Id.* We believe the doctrine of abstention should be applied here.

The Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971) held that absent extraordinary circumstances, a federal court is precluded from enjoining a pending state criminal proceeding. However, *Younger* approved the possibility of federal injunctive relief in extraordinary circumstances:

(1) Where irreparable injury is both "great and immediate," *Younger*, 401 U.S. at 46 . . .

(2) Where the state law is "flagrantly and patently violative of express constitutional prohibitions," *Id.* at 53, . . . and (3) Where there is a showing of "bad faith, harassment, or other unusual circumstances that would call for equitable relief[.]" *Id.* at 54. . .

Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery, 720 F.2d 897, 902 n.2 (6th Cir. 1983).

In the present case, the Times presented no evidence at the trial pertaining to irreparable injury. The only evidence in the record pertaining to possible irreparable harm are affidavits which state that "cost effectiveness of the newsboxes helps keep the cost of the paper as low as possible" and that "if the Times is not permitted to maintain newspaper vending machines . . . sales will be diminished. . . ." With a daily circulation of 930,000 papers, we find it difficult to believe that the Times suffered "great and immediate" irreparable injury caused by the City's prohibition of seven newsracks within the residential zones of the City.

Next, the Times does not indicate how the City's ordinances are "flagrantly" violative of "express constitutional prohibitions." Nor can any flagrant violations be construed from the City's Ordinances. Finally, there has been no allegation nor any proof of bad faith prosecution. Consequently, we find that the present case falls within the *Younger* doctrine of abstention.

Accordingly, we vacate the judgment of the district court and remand to the district court with instructions to dismiss the case without prejudice under the doctrine of abstention.

APPENDIX C**Judgment Entry of the District Court**

(Filed July 10, 1984)

C83-63

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.,

Plaintiff,

vs.

CITY OF LAKEWOOD,

Defendant.

GEORGE W. WHITE, J.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of the defendant and against the plaintiff. Plaintiff's complaint is hereby dismissed at defendant's costs.

/s/ GEORGE W. WHITE

U. S. District Judge

Date 7/19/84

APPENDIX D**Memorandum Opinion and Order of the District Court**

(Filed July 12, 1984)

C83-63

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.,

Plaintiff,

vs.

CITY OF LAKEWOOD,

*Defendant.***MEMORANDUM AND ORDER**

This is an action arising under the Civil Rights Act of 1871, 42 U.S.C. §1983. The case came on for trial and the Court having heard the testimony of witnesses, having examined the exhibits, and having reviewed the post trial memorandum of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Plain Dealer Publishing Company is an Ohio Corporation which publishes The Plain Dealer, a newspaper of general circulation throughout the Cleveland metropolitan area and Ohio.

2. The City of Lakewood is a municipal corporation chartered under the Constitution and laws of the State

of Ohio, including the "home rule" amendment of the Ohio Constitution, Article XVIII, §3.

3. The territory comprising the City of Lakewood is approximately 5.5 square miles and the City is an older residential community located in Cuyahoga County, Ohio west of the City of Cleveland (456 square miles), bordered by the City of Cleveland on the East and South, by Rocky River to the West, and by Lake Erie to the North.

4. The population of the City of Lakewood as measured by the census in 1980 was 61,963. The City of Lakewood has historically been a city of homes, located four to six miles west of downtown Cleveland. The commercial areas of the City are located essentially along Madison and Detroit Avenues, east and west across the entire breadth of the City in close proximity and convenient to all residential areas of the City.

5. There is no stopping permitted along Clifton Boulevard located in a residentially zoned use district in the morning hours at the very time that the Plaintiff is attempting to sell its newspapers along said street, which would induce traffic to stop for the purchase of same and cause accidents in the opinion of Captain Glenn Walker.

6. The Plain Dealer Publishing Company sales in a general sense are 77 percent by home delivery through junior carriers or adults and 80 percent on Sundays by home delivery, the balance of sales being by single copy sales through retail outlets and coin-operated vending boxes, the latter constituting 23 percent of single copy sales, or 4.6 to 5.29 percent of total sales.

7. With respect to week-day sales of papers, the Plain Dealer suggested price is 20 cents per paper of

which the Plain Dealer receives 12 1/6 cents a copy from home delivery sales and 16 cents on single copy sales, the difference going to the retail outlet in the case of retail sales, and to the circulation personnel who places the papers in the vending machines, who must pay only the standard single copy price for the papers and gains any profit.

8. There is no area within the City of Lakewood more than one quarter mile from an all night newspaper outlet, i.e., stores open all night or newspaper dispensing boxes located on property owned other than by the City of Lakewood.

9. The City of Lakewood has for some time and continues to own all the streets in the City of Lakewood, as well as the tree lawns and sidewalks adjacent thereto in fee simple, and is otherwise authorized to regulate, license or prohibit the selling of goods, merchandise, or medicines on the street, has special power to regulate the use of the streets and has the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance and is liable for injury caused by failure of such duty pursuant to Ohio Revised Code §§715.24 and 723.01.

10. Defendant's Exhibit "Z", is an exact copy of the Zoning Code of the City of Lakewood on file with the Clerk of Council and adopted by the City Council by Ordinance 77-82 including a zoning map which substantially reflects the actual uses of land in the City of Lakewood.

11. Prior to the filing of this case, the Plain Dealer inquired about placing coin-operated newspaper dispensing

devices at sites within the City of Lakewood, including, along Clifton Boulevard on the corners of the intersections with Webb (SW), Summit (SE), Warren (SW), Bunts (SW), Nicholson (SW), Fry (SE), Thoreau (SW), and Belle (SE) Streets; along Detroit Avenue at the corners of the intersections with Lincoln (SW), Cordova (SW), Westwood (SW), and Warren (NW and SW); and along Madison at the corners of the intersections with Warren (SW), Bunts (SW), and Lincoln (SW), and the Law Director replied to such request by letter on May 21, 1982, denying the requests of the Plain Dealer for permission to place commercial coin-operated newspaper dispensing devices along the streets of Lakewood, citing §901.18 which provided at that time as follows:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

12. The Plain Dealer filed suit in the within case eight (8) months later on January 5, 1983, attacking the constitutionality of the aforesaid §901.18 of the Lakewood Codified Ordinances and on or about August 18, 1983, the Court upon motion for summary judgment ruled such ordinance provision to be an unconstitutional exercise of police power, finding that a reasonable means of newspaper distribution had been totally banned and determined to hold the matter for a permanent injunction for sixty (60) days in order to give the City of Lakewood an opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with Plaintiff's First Amendment Rights.

13. Recognizing that the term "public property" includes more than the property owned by the City of Lakewood, i.e., it would include property of the Board of Education, the County, the State, the Federal Government, etc., as well as privately held property dedicated for public uses, and the responsibility of the City of Lakewood to enforce its ordinances and assume its responsibility respecting the streets, ordinance 108.83 and 109.83 were adopted on October 17, 1983, copies of which ordinances are set forth respectively in Joint Exhibit 1 and Joint Exhibit 2, wherein §901.18 was amended to permit erection of a structure on public property with the consent of the owner thereof where permitted by the statutes of the State of Ohio and the ordinances of the City of Lakewood, including, but not limited to zoning provisions, established that applications for rental agreements or permits for the exclusive use of public property owned by the City of Lakewood should be made to the City Council unless otherwise permitted by ordinance and established a procedure for applying to the Mayor for §901.181 as adopted by Ordinance 109-83, Joint Exhibit 2.

14. After enactment of the aforesaid ordinances, the Counsel for the Plain Dealer indicated dissatisfaction with certain provisions and a meeting was arranged to go over their objections after which upon further study and consultation with officials of the City of Lakewood, §901.181 was amended in response to the Plain Dealer complaints by ordinance 2-84, adopted January 3, 1984, a true copy of which is set forth in Joint Exhibit 3, and Joint Exhibit 4 sets forth §901.181 as adopted by Ordinance 109.83 and amended by Ordinance 2-84 in composite.

15. The provisions of new §901.181 as amended and set forth in Joint Exhibit 4 mandate that the Mayor

permit installation of coin-operated newspaper dispensing devices upon application, payment of a \$10.00 rental fee for each site, provision of a certificate of insurance showing the City of Lakewood as a named insured for liability for any injury respecting use of property of the City of Lakewood, at locations permitted by the terms of such section and in accordance with the provisions of such section, subject only to the Architectural Review respecting appearance and architectural standards under Chapter 1325 of the Codified Ordinances.

16. The regulations of §901.181 as amended permit location of the coin-operated newspaper dispensing devices at all locations requested on Madison and Detroit Avenues in the commercial district upon compliance with the provisions of the section, but not along Clifton Boulevard at the sites requested, all of which lie in residential use districts, to wit: In an R-2 (single and two family residential use district), at Webb, Summit, Bunts, Thoreau, and Belle; M-1 or low rise apartments at Warren; and M-2 or high rise apartments at Fry.

17. The Plaintiff Cleveland Plain Dealer has not made any application for a rental permit in any form whatsoever for the use and occupation of City of Lakewood owned real estate for erecting commercial coin-operated newspaper dispensing devices.

18. The City of Lakewood by its Mayor stands ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City as mandated by Codified Ordinance §901.181 along Madison and Detroit Avenues at the above stated locations.

19. The placement of a newspaper dispensing device on property is normally of a permanent nature, the de-

vice generally occupying a specific portion of property for months or years.

20. The main function of the newspaper dispensing devices is to distribute the Plain Dealer newspaper.

21. The newspaper dispensing devices serve as an advertising benefit to the Plain Dealer as the Plain Dealer's name is conspicuously present on all such devices.

22. Use of the tree lawns and sidewalks adjacent to the streets by the City of Lakewood is limited only to accessory uses relating to the health and safety of the public using the streets or located along such street, *e.g.*, telephone poles, lines, boxes, and stations are necessary for free emergency calls from the right of way as well as from the residents and occupants along the streets; electric poles and facilities are necessary to provide light for the streets and operation of traffic lights; and bus shelters are necessary for the health of the citizens and for protecting them while they wait for public transportation. Newspaper boxes have no health or safety purpose in the public right of way and are there only for the convenience of the Plain Dealer to sell to its customers.

23. The two hundred fifty foot (250) distancing requirement of the Lakewood Ordinances permits a newspaper to locate one or two newspaper boxes at every block.

24. It is uncontroverted that the distancing limitations of §901.181 allow location of the Plaintiff's newspaper dispensing boxes at every site which they selected.

25. The allocation of the non-residential areas, the BR (Business Residential), B1 (Office) and X (Industrial) areas of the City include the entire breadth of the

City along Madison and Detroit Avenues, several streets in the Southeast sector of the City, over half of the area along West 117th Street, an area adjacent to Warren Road in the southern central portion of the City and an area along West Clifton and Sloane Avenues in the western portion of the City as shown by the zoning map of Defendant's Exhibit "Z", which in addition to the non-City owned property sites, provide more than adequate sites for placement of newspaper dispensing boxes along the streets of the City of Lakewood, which sites are all in close proximity to the homes and business in the City of Lakewood. The only reason why the Plaintiff has not placed newspaper dispensing devices along the streets of Lakewood where permitted, is that the Plaintiff has not applied for such use.

26. The provisions of §901.181 are the least restrictive regulations for placement of newsboxes along the streets of Lakewood; site selection is not restricted specifically, e.g., in handicapped ramps or so as to restrict egress from parked vehicles, for every conceivable proper reason.

27. Given the availability of outlets and make up of the City of Lakewood, it is poor City planning to permit newspaper dispensing devices along the streets, especially since placement of anything in such areas increases the probability for accidents and injury.

28. The City of Lakewood's property is a finite resource.

CONCLUSIONS OF LAW

1. No property rights to use the properties of others including the City of Lakewood is created or granted by either the First or Fourteenth Amendments to the United States Constitution inuring to the benefit of the Plain

Dealer. *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Bishop v. Wood*, 426 U.S. 341 (1976).

2. The proposed placement of newsracks on City property is a "taking" of property. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 37 L. Ed. 380 (1893) and *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982).

3. The City of Lakewood has no obligation under the Constitution and laws of the United States or otherwise mandating that it permit the exclusive use of City of Lakewood real estate for private purposes, commercial or otherwise, to the exclusion of all other members of the public. *Board of Regents v. Roth*, *supra*, *Bishop v. Wood*, *supra*.

4. The City of Lakewood is mandated by Ohio Revised Code §723.01 to maintain the streets, sidewalks, and public ways open to the public free of nuisance, is held civilly liable by such Section for failure of such duty, and its broad discretion should not be bridled nor should it be exposed to additional liability without indemnification by any private commercial use on such City owned property by Plaintiff or otherwise. *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26 (1982); *Dickerhoof v. Canton*, 6 Ohio St. 3d 128 (1983), *Associated Press v. NLRB*, 301 U.S. 103 (1936).

5. A municipality may regulate the use of the finite resources. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 23 L. Ed. 2d 371 (1969).

6. The Fourteenth Amendment to the U.S. Constitution, the Charter of the City of Lakewood, the Ohio Constitution and the laws of the State of Ohio require that the City of Lakewood hold its property in a fiduciary capacity

for the benefit of all citizens and taxpayers of the City and forbid allowing property so held to be exclusively used by any person, firm or corporation for private purposes, thereby denying equal protection to other citizens, unless such City property is not at any time needed for municipal purposes and the City receives fair and just compensation therefor. See cites after paragraph 13.

7. Plaintiff's commercial use of property is subject to reasonable zoning ordinances, the same as bookstores, theatres, places of public assembly and other commercial uses, whether of the "First Amendment" classification or otherwise, and the Fourteenth Amendment of the U.S. Constitution mandates equal protection for all such uses. *Young v. Mini Theatres*, 427 U.S. 50 (1976), *Associated Press v. NLRB*, *supra*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

8. Section 901.181 as presently constituted is a reasonable and constitutional enactment for the protection of property rights of persons and entities owning public property including the City of Lakewood. *Kash Enterprises, Inc. v. City of Los Angeles*, 562 P. 2d 1302 (1977), *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 103 S.Ct. 948, 74 L.Ed. 2d 794 (1983), *Red Lion Broadcasting Co. v. F.C.C.*, *supra*, *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748 (1976).

9. The streets and highways of the City of Lakewood are not a public forum for the permanent erection of signs and devices for the dispensing of printed material for private purposes, whether for advertising purposes or otherwise and whether for commercial purposes or otherwise. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

10. The publisher of a newspaper has no special immunity from the application of general laws and has no special privileges to invade the rights of others. *Associated Press v. NLRB*, *supra*.

11. The erection of a coin-operated newspaper dispensing device for the sale of newspapers at a particular site constitutes a commercial use at such site. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Young v. Mini Theatres*, *supra*, *Murdock v. Pennsylvania*, *supra*.

12. Prohibition of rental for use of coin-operated newspaper dispensing devices with commercial advertising thereon in the public right of way of streets located in residential use districts is a reasonable and constitutional regulation for the preservation of open spaces and a City may not constitutionally permit use of public property, whether privately owned or owned by the State or any agency thereof, located in a residential use district to be leased or otherwise exclusively used for private commercial purposes and this applies to all streets or portions thereof located in residential use districts in the City of Lakewood, including Clifton Boulevard. *Metromedia, Inc. v. San Diego*, *supra*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

13. The City of Lakewood holds public property in trust for the citizens of the City of Lakewood and may not permit private persons to exclusively use such property without adequate consideration including streets which have been held in trust for the use of the public and part of the privileges, rights, and liberties of citizens. *City of St. Louis v. Western Union Telegraph Co.*, *supra*, *Gilbert v. Dayton*, (App. 1944) 42 O.L.Abs 193, 59 N.E. 2d 454.

Hugger v. Ironton, (1947) 83 O.App. 21, 38 O.O. 130 cert. denied, 148 O.S. 670; O.R.C. §733.56.

14. The provisions of Chapter 1325.04 providing for architectural review to all erection of structures or construction wheresoever situated within the City, including construction by the City, mandates that coin-operated newspaper dispensing devices be subject to architectural review the same as erection of any other structure and exemption of newspaper dispensing devices would constitute discrimination and a denial of equal protection to all others erecting structures and doing construction in the City of Lakewood. Fourteenth Amendment to U.S. Constitution, *Young v. Mini Theatres*, supra, *Associated Press v. NLRB*, supra.

15. Since the City of Lakewood is liable for nuisances in the public right of way pursuant to §723.01 of the Ohio Revised Code, it is not unreasonable to require indemnification and securing of insurance, including the City of Lakewood as a additional named insured by persons permitted to use portions of the street right of way for private purposes. *Young v. Mini Theatres*, supra, *Associated Press v. NLRB*, supra.

16. The charge of \$10.00 per site per year for location of a newspaper dispensing device is a reasonable charge for private use of public lands taking into account the rental value of the property in the City of Lakewood and the administrative expense involved in regulating the placement of coin-operated newspaper dispensing devices. *City of St. Louis v. Western Union Telegraph Co.*, supra.

17. The regulations and terms of permit provided by §901.181 of the Codified Ordinances of the City of Lakewood as presently constituted are reasonable terms for the rental of public property for private use and such

terms are also reasonable in the exercise of the responsibility of the City of Lakewood to keep the right of way free of nuisances as mandated by Ohio Revised Code §723.01. *Associated Press v. NLRB*, supra; *Young v. American Mini Theatres*, supra; *Metromedia, Inc. v. San Diego*, supra, *City of St. Louis v. Western Union Telegraph Co.*, supra; *Red Lion Broadcasting v. F.C.C.*, supra; *Village of Belle Terre v. Boraas*, supra.

18. Application and appeal pursuant to the provisions of Lakewood Codified Ordinance §901.181 and Ohio Revised Code Chapter 2506 provides an adequate remedy to redress any claimed wrong alleged by the Plaintiff, Plain Dealer Publishing Company. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983).

19. The provisions of the Lakewood Codified Ordinance §901.18 and §901.181 as presently constituted also constitute a proper exercise of police power in harmony with the zoning regulation and are otherwise valid time, manner and place regulations under circumstances wherein the Plaintiff Plain Dealer Publishing Company has other adequate alternate channels of communication without using any property of the City of Lakewood and there are no other less intrusive means available for regulating the placement of the coin-operated newspaper dispensing devices short of sacrificing open spaces in residential neighborhoods and generally jeopardizing the health, safety and welfare of the public. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, supra; *Va. Pharmacy Bd. v. Va. Consumer Council*, supra; *Red Lion Broadcasting Co. v. F.C.C.*, supra; *Young v. Mini Theatres*, supra; *Associated Press v. NLRB*, supra; *Metromedia, Inc. v. San Diego*, supra; *Village of Belle Terre v. Boraas*, supra, *Euclid v. Ambler Realty Co.*, supra, *Heffron, et al. v. International*

Society for Krishna Consciousness, Inc., et al., 452 U.S. 640 (1981).

20. A fixed retailer of First Amendment protected material is not the same as a person who travels door-to-door disseminating material, and a municipality need not treat them the same. *Murdock v. Pennsylvania*, *supra*, and *Young v. American Mini Theatres*, *supra*.

21. To properly determine the validity of laws regulating a specific method of communication, the differing natures, values, abuses and dangers of the particular medium of communication must be considered. *Metromedia, Inc. v. San Diego*, *supra*, at 501, *Kovacs v. Cooper*, *supra*, at 97.

22. First Amendment protected commercial speech may be regulated and the regulation will be valid if: (1) It seeks to implement a substantial government interest; (2) It directly advances that interest; and, (3) it reaches no further than necessary to accomplish the given objective. *Metromedia, Inc. v. San Diego*, *supra* 507.

23. Traffic safety, proper functioning of a City's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests, and the subject ordinances reach no further than necessary to accomplish the City's objectives. *Metromedia, Inc. v. San Diego*, *supra*, at 508, O.R.C. §723.01, *Dickerhoof v. Canton*, *supra*.

24. The plaintiff, a mere commercial user of the streets, cannot be properly placed in the same classification as tax paying property owners adjacent to the streets or the City, public transportation companies, public utility companies (telephone and electric) whose facilities in the right of way are directly for public health and safety pur-

poses, *e.g.*, emergency communications (free police and fire calls), shelter and protection from weather and flying street debris, street lighting, traffic lights and signs to direct and regulate traffic and plaintiff cannot claim a denial of equal protection by reason of any Lakewood regulations.

25. The plaintiff may not claim special exemption from charges for using city property, *e.g.*, parking at parking meters, or even charges for use of roadways such as turnpike tolls.

26. Accordingly, judgment is for Defendant. Defendant to pay costs.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

APPENDIX E

**Order of the United States Court of Appeals for the
Sixth Circuit Denying Petition for Rehearing**

(Filed September 25, 1986)

No. 84-3682/3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,

Plaintiff-Appellant,

Cross-Appellee,

vs.

CITY OF LAKEWOOD,

Defendant-Appellee,

Cross-Appellant.

ORDER

BEFORE: KEITH and KENNEDY, Circuit Judges, and
UNTHANK,* United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

*Hon. G. Wix Unthank sitting by designation from the Eastern District of Kentucky.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

APPENDIX F

**Notice of Appeal to the Supreme Court of the
United States**

(Filed in the Sixth Circuit Court of Appeals
on December 18, 1986)

Case Nos. 84-3683, 84-3722

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING COMPANY,

Plaintiff-Appellant,

vs.

CITY OF LAKEWOOD,

Defendant-Appellee.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that the above-named Defendant-Appellee, the City of Lakewood, Ohio, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on July 10, 1986, as affirmed by the Court's denial of Appellant's "Petition for Rehearing En Banc" on September 25, 1986.

This Appeal is taken pursuant to 28 U.S.C. §1254(2).

/s/ HENRY B. FISCHER

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER

& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

(216) 781-1212

Attorneys for Defendant-Appellant

[sic]

APPENDIX G

Codified Ordinance of City of Lakewood

Section 901.181, Codified Ordinances, City of Lakewood,
As Adopted by Ordinance 109-83, passed October 17, 1983,
and Amended by Ordinance 2-84, passed January 3, 1984.

**901.181 NEWSPAPER DISPENSING DEVICES;
PERMIT AND APPLICATION.**

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6)

inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under

the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(d) Rental permits issued pursuant to this Section may be revoked by the Mayor after notice and hearing for any of the following causes:

(1) Fraud, misrepresentation or any false statement contained in the application for such a permit;

(2) violation of any provision of ordinances regulating such rental permit; or

(3) violation of the terms of the rental permit granted.

Notice of hearing for such a revocation shall be given in writing stating the grounds of the complaint together with the time and place of hearing and shall be mailed postage prepaid to the permittee at the address given in the rental permit

application at least five (5) days prior to the date set for hearing.

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

APPENDIX H**Ohio Revised Code****CHAPTER 2506: APPEALS FROM ORDERS OF
ADMINISTRATIVE OFFICERS, AND AGENCIES****§ 2506.01 Appeal from decisions of any agency
of any political subdivision.**

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

§ 2506.02 Filing of transcript.

Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall

upon the filing of a praecipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of costs of the appeal.

§ 2506.03 Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from; in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

§ 2506.04 Finding and order of court.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.

MOTION

3
No. 86-1042

Supreme Court, U.S.
FILED

FEB 10 1987

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,

Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**MOTION OF APPELLEE TO DISMISS APPEAL OR
TO AFFIRM JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

JAMES P. GARNER, Counsel of Record

KAREN B. NEWBORN

DAVID L. MARBURGER

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

*Attorneys for Appellee Plain
Dealer Publishing Company*

QUESTIONS PRESENTED

1. Whether the Court of Appeals ruled correctly that two provisions of a municipal ordinance are unconstitutionally vague where they fail to provide reasonably narrow, definite, and objective standards for determining whether to grant a license to engage in a First Amendment activity, effectively vesting unlimited discretion in city officials to deny said licenses.
2. Whether the Court of Appeals ruled correctly that a provision of a municipal ordinance regulating newsboxes is unconstitutional where it unjustifiably singles out newspapers to insure and indemnify the municipality for personal injury liability.

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No. 86-1042

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**MOTION OF APPELLEE TO DISMISS APPEAL OR
TO AFFIRM JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

INTRODUCTORY STATEMENT

Appellee Plain Dealer Publishing Company moves to dismiss or summarily to affirm, pursuant to United States Supreme Court Rules 16.1(c) and (d), on the ground that the questions presented are so unsubstantial as to need no further argument and that the decision below is manifestly correct.

CONSTITUTIONAL PROVISIONS AND CITY ORDINANCES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Fourteenth Amendment, United States Constitution:

No State shall . . . deprive any person of . . . liberty . . . without due process of law; . . .

Section 901.181, Lakewood Codified Ordinances:

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section shall mean a mechanical coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) [N]o newspaper dispensing device shall be placed, installed, used or maintained:

- (1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;
- (2) within five (5) feet of any fire hydrant or other emergency facility;
- (3) within five (5) feet of any intersecting driveway, alley, or street;
- (4) within three (3) feet of any marked crosswalk;
- (5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;
- (6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and
- (7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

- (5) the permittee shall save and hold the City of Lakewood harmless from any and

all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

.

- (7) such other terms and conditions deemed necessary and reasonable by the Mayor.

STATEMENT OF THE CASE

This appeal presents no new constitutional issues. The arguments raised by Appellant City of Lakewood about "takings" of property and the like concern hypothetical issues wholly unrelated to the rulings from which the City appeals. The Court of Appeals invalidated on constitu-

tional grounds only three provisions of the City's ordinance. Those rulings are:

1. The City's ordinance unconstitutionally gave the City's Mayor unguided discretion to deny newsbox permits.
2. The City's ordinance unconstitutionally gave the City's Architectural Board of Review unguided discretion to disapprove the design of newsboxes.
3. The City's ordinance unconstitutionally singled out newsbox owners (newspaper publishers and distributors) to insure and indemnify the City for personal injury liability.

794 F.2d 1139, 1143-47. These rulings involve and conform with long-standing constitutional constraints on municipal regulation of First Amendment activities. The order of the Court of Appeals did not grant a First Amendment property right in City property, nor did the Court order a "taking" of City property. By its own ordinance, the City allows newsboxes to be placed on its public ways, and the City does not dispute Appellee's general right to distribute its newspapers through newsboxes.¹

1. The City does not dispute that the use of newsboxes to distribute newspapers directly to the public implicates the First Amendment. In its Jurisdictional Statement, Appellant does not claim otherwise. In fact, Appellant acknowledges that its newsbox regulations must conform to and may not abridge First Amendment rights. (Jurisdictional Statement at 13.) Indeed, every federal appellate decision concerning municipal newsbox regulation has ruled that the First Amendment protects the use of newsboxes to circulate newspapers. *E.g. Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984); *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984). Federal district courts and state courts uniformly agree.

(Continued on following page)

STATEMENT OF FACTS

I. Appellee's Use Of Newsboxes.

Appellee publishes a daily newspaper called *The Plain Dealer*. Appellee distributes *The Plain Dealer* to the general public, with its primary circulation in the greater Cleveland, Ohio, metropolitan area, including the City of Lakewood, and elsewhere in Ohio. Like other metropolitan daily newspapers, *The Plain Dealer* contains a variety of different articles each day reporting news about current events, opinions on issues of current public interest, general information, and news and comment about sports and entertainment.

Most of Appellee's readers obtain *The Plain Dealer* through home delivery. However, each weekday, more than 21,000 people obtain the newspaper from Appellee's newsboxes.² Appellee has placed individual newsboxes at specific locations on public sidewalks in municipalities, primarily in business districts and in areas of higher commuter and pedestrian traffic. The newsboxes are about 1½ feet wide, just under 1½ feet deep, and about 4 feet high. To keep the boxes from falling or being taken away

Footnote continued—

Southern New Jersey Newspapers, Inc. v. State of New Jersey Dept. of Transportation, 542 F. Supp. 173 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F. Supp. 228 (E.D. Pa. 1974); *News Printing Co. v. Borough of Totowa*, 211 N.J. Super. 121, 511 A.2d 139 (1986); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (1985); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (1975); *California Newspaper Publishers Ass'n, Inc. v. City of Burbank*, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (1975); *Gannett Co. v. City of Rochester*, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

2. Appellee's weekend circulation from newsboxes is about one-half its weekday newsbox circulation. These are average figures.

(i.e., stolen), Appellee either places a weight inside them or cables them to a stationary object.³ As one court described newsboxes:

It is obvious that [newsboxes] are not the same as a table, box or stand in the strict sense. However, they are easily moved and in a way are functionally safer than a newsboy. . . . They are essentially semi-stationary newsboys.

[Newsboxes] are not permanent nor are they absolutely stationary. Their location can be changed simply by turning a key in a lock.

Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648, 654, 659 (Sup. Ct. 1972).

Early each morning, Appellee's newspaper delivery drivers go to the locations where the newsboxes have been placed and fill them with that day's issue of *The Plain Dealer*. People who wish to read the newspaper simply deposit coins into the newsbox, open a door on the front of the box, and remove a newspaper. In some areas the public demand for the newspapers is so high that Appellee fills some of its boxes more than once a day.

Appellee has used newsboxes to distribute its daily newspaper directly to the public since the early 1970s. It uses about 2,000 newsboxes and has never encountered a single personal injury or safety problem with any of them.

3. The City incorrectly suggests that Appellee chains newsboxes to fire hydrants. Appellee has not and does not chain newsboxes to fire hydrants, and the City's ordinance specifically prohibits newsboxes to be placed within five feet of any fire hydrant. Appellee takes no issue with that provision.

II. The City's Regulation Of Newsboxes.

A. Section 901.181, Lakewood Codified Ordinances.

According to the ordinance at issue, Section 901.181 of the Codified Ordinances of the City of Lakewood, a newspaper publisher must first seek a permit before placing a newsbox in one of the areas where they are allowed. The ordinance gives the Mayor discretion to deny a permit application according to such "terms and conditions" as he deems to be "reasonable and necessary." Additionally, the Architectural Board of Review has unlimited discretion to withhold "approval" of newsboxes.⁴ The Board has no written standards governing newsboxes, and does not involve itself with other structures on the City's public right of way, such as bus shelters or telephone booths.

In formulating the newsbox regulations of Section 901.181, the City did not consult with the Architectural Board, the City Engineer, the City Planning Director, the City Superintendent of Streets, or the City Police Department.

B. Ordinance No. 1-87.

A new ordinance regulating newsboxes in the City of Lakewood took effect in January, 1987. This ordinance, No. 1-87, reenacts Section 901.181 except that it suspends those provisions found by the Court of Appeals to be unconstitutional.⁵ Like its predecessor, the new ordinance authorizes the placement of newsboxes on certain portions of the City's public sidewalks.

4. The City's Architectural Board consists of five officials. Only two of the five Board members are architects. The Board acts by a vote of a simple majority.

5. Ordinance No. 1-87 is reprinted in the Appendix to this motion at p. A1.

In its Jurisdictional Statement, the City argues that the absence in Section 901.181 of a provision prohibiting newsboxes at ramps for the handicapped justifies broad official discretion to deny newsbox permits. (Jurisdictional Statement at 8, 18.) In its new ordinance, the City easily corrected that drafting oversight by including such a provision, to which Appellee has no objection.

The new ordinance also addresses the City's concern about property rights. It expressly provides that "[n]o permanent rights shall be secured" upon the granting of a newsbox permit.⁶ Ordinance No. 1-87, Sec. 1. Appellee has never claimed a property right in City property.

6. The ordinance provides further that the above new provisions, as well as the suspension of the provisions ruled to be unconstitutional by the Court of Appeals, are temporary. Those additions and suspensions will expire 60 days after the outcome of this appeal.

ARGUMENT

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. The City's Arguments Concern Hypothetical Questions Unrelated To The Court Of Appeals' Rulings At Issue.

The questions presented by this appeal are not substantial. The rulings at issue follow a long line of decisions by this Court and other federal courts. Appellee has never claimed to be free from reasonable regulation, nor do the rulings appealed from present an issue of whether the First Amendment requires the City to allow newsboxes on its public sidewalks. Through its own ordinance, the City allows newsboxes to be placed on its property, and the City acknowledges that its newsbox regulations are subject to First Amendment constraints. (Jurisdictional Statement at 13.)

In striking down parts of those regulations, the order of the Court of Appeals presents only long-settled constitutional issues. Those issues are whether the City may violate basic First Amendment precepts by vesting its officials with unlimited discretion to deny newsbox permits, and whether the City may unjustifiably single out the press to bear the regulatory burden of insuring and indemnifying the City.⁷

7. The City's arguments concerning property rights, "taking" of property, and rental fees are irrelevant to its appeal and should be disregarded. The order of the Court of Appeals did not grant Appellee a First Amendment property right in City property and the annual fee was struck down on nonconstitutional grounds with a suggestion in dicta that the fee did not

(Continued on following page)

II. The Court Of Appeals Applied Well-Settled Constitutional Law By Ruling That The City May Not Vest Its Officials With Unguided Discretion To Deny Newsbox Permits.

The City requires newspaper publishers to submit applications in advance to City officials who decide *ex parte* whether a particular applicant may receive a newsbox permit. Although a newsbox may comply fully with all of the place and manner restrictions specified in the City's ordinance, it will nevertheless be illegal unless a permit has been secured in advance.

The ordinance authorizes the Mayor and the Architectural Board of Review to control whether a newsbox permit will be issued, but does not set forth reasonably narrow, definite, and objective standards for making that determination. As the Court of Appeals ruled, the language of the ordinance limits the conditions under which the Mayor may grant a permit, but contains no standards to restrict the Mayor's denial of a permit. The ordinance allows the Mayor to deny a permit application according to any conditions that he deems to be "necessary and reasonable." The ordinance also requires that newsboxes receive the "approval" of the Architectural Board. Lakewood Codified Ordinances § 901.181(a), (c)(7).

Applying a long line of decisions by this and other federal courts, the Court of Appeals ruled that the broad, standardless discretion authorized by the ordinance is unconstitutional. That decision is manifestly correct and

Footnote continued—

violate the First Amendment. The City is thus a nonaggrieved party on those issues and, accordingly, those issues are not appealable by the City. See *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980).

Appellant cites no decisions—federal or state—to the contrary.

For over four decades, this Court has ruled consistently that local laws may not vest municipal officials with unguided discretion to license an activity implicating the First Amendment. *E.g. Sect'y of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Saia v. New York*, 334 U.S. 558, 560-61 (1948); *Largent v. Texas*, 318 U.S. 418, 422 (1943).

As recently as 1984, this Court reaffirmed this long-standing principle of First Amendment law:

Our cases make clear that a statute that requires . . . a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship. . . .

Sect'y of State of Maryland, 467 U.S. at 964 n.12. One federal court summarized the problem underlying an ordinance which, like Appellant's, contains no express guidelines for the exercise of official discretion:

[W]here public officials, in making decisions [about whether to grant permits] use . . . criteria or reasons that are either vague or completely unknown, the party affected has no way of knowing how to achieve compliance with the criteria nor even of challenging them as being improper. In such situations, the public officials literally have unimpeded discretion to regulate the activity in question in whatever manner they desire.

Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8, 17 (S.D. Iowa 1971).

On its face the City's ordinance sets forth no guidelines to restrict the exercise of the Mayor's discretion in selecting among applicants for a newsbox permit. He may deny a permit for whatever reasons that he deems to be "necessary and reasonable." Such an open-ended grant of official discretion presents the potential for selecting permit applicants according to the points of view of their newspapers instead of the size or proposed location of their newsboxes. In *Largent v. Texas*, 318 U.S. 418, this Court struck down a similar ordinance provision which vested discretion in a local mayor to issue a permit to sell books where he deemed it "proper or advisable."

The City argues that its Mayor can refuse a permit only for "health and safety reasons." However, as the Court of Appeals ruled, no such language appears anywhere in the ordinance. Appellant's alleged evidence of such a standard was merely a proffer by its counsel concerning extrinsic testimony unrelated to the language of the ordinance itself. But, even if the ordinance did contain that "standard," which it does not, this Court has already ruled that a nearly identical standard is constitutionally insufficient. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (ordinance authorizing denial of a parade permit whenever, according to their discretion, city officials thought that "the public welfare, peace, safety, health, . . . or convenience" required that the permit be refused).

The City urges that it needs broad discretion to correct drafting errors, such as its failure to prohibit the placement of newsboxes near handicap ramps. The City's acknowledged failure to draft its regulations carefully cannot justify violating basic constitutional principles. Moreover,

the City's new ordinance (No. 1-87) specifically prohibits the placement of newsboxes at handicap ramps, demonstrating the ease with which the City can cure through amendment any drafting oversights it perceives, while avoiding the censorial threat which broad official discretion presents.

As for the Architectural Board of Review, contrary to the City's mischaracterization, Appellee has never claimed that its status as a newspaper publisher exempts it from the Architectural Board's review. As the ordinance provides no standards for the Board's "approval" of newsboxes, the court below merely applied this Court's long-standing precedents against subjecting the lawfulness of First Amendment activities to the unguided discretion of administrative officials.

The City claims that Section 1323.03 of its ordinances provides the Board with adequate standards, but that ordinance merely allows the Board to regulate the construction of *buildings* according to "accepted and recognized architectural principles." As the Court of Appeals recognized, a newsbox is not a "building." Moreover, the Board Chairman admitted at trial that the Board actually has no standards governing newsboxes except its subjective judgment of what is "appropriate." He also testified that the Board does not involve itself with other objects or structures placed on the public right of way.

The City's claim that the Mayor and the Architectural Board are subject to the standards set forth in Section 2506.04 of the Ohio Revised Code does not save its ordinance provisions. Section 2506.04 sets forth the standard upon which a state court "may" reverse or modify local administrative decisions. This Court has specifically re-

jected the City's argument that the availability of judicial review can save an otherwise unconstitutional ordinance:

[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible.

Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); *accord Saia*, 334 U.S. at 560.

As Appellant's permit scheme contains no standards for the exercise of discretion by the Mayor and the Architectural Board, the Court of Appeals' ruling is entirely consistent with the well-settled principles announced by this Court in numerous cases over the years.

III. The Court Of Appeals Applied Well-Settled Constitutional Law By Ruling That The City May Not Unjustifiably Impose Insurance And Indemnity Requirements.

The Court of Appeals also followed well-settled law in striking down the City's requirements that newsbox owners insure the City for \$100,000 and indemnify the City. Lakewood Codified Ordinances § 901.181(c)(5). The Court of Appeals held correctly that the City's ordinance violates the First Amendment by unjustifiably singling out the press to bear the burden of insurance and indemnity.

The Court of Appeals did not rule, and Appellee has never argued, that Appellee is exempt from generally applicable laws and obligations. However, the City's insurance and indemnity requirements are not "generally applicable," but apply only to newspaper publishers and distributors. Appellant does not require bus and telephone companies to insure or indemnify the City as a condition

for placing their bus shelters and telephone booths on public ways, nor does it require any other user of its rights of way to provide insurance or indemnity.

Regulations which single out the press violate the First Amendment unless justified by an overriding government interest that cannot be furthered except through such differential treatment. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 592 (1983).

The City points to no reason why newsboxes pose any greater liability risk than the bus shelters and telephone booths placed on its public ways.⁸ Moreover, Appellee's newsboxes have not caused any kind of safety or liability problem since Appellee began using them more than ten years ago. The insurance and indemnity requirements are thus unjustified because there is no evidence that newsboxes pose any liability risk to the City.⁹ See *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056-57 (2d Cir. 1983). While Appellant has an interest in promoting public safety, it has not established a suf-

8. Contrary to the City's argument, this Court has already ruled that privately held utilities are not governmental or quasi-governmental entities. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Moreover, the status of those entities has no effect on the liability risks posed by their structures, e.g. telephone booths and bus shelters.

9. Citing Section 723.01, Ohio Revised Code, the City suggests that it is absolutely liable for personal injuries that occur on its property. However, Section 723.01 greatly limits the City's liability risk. Liability requires findings of (1) a nuisance (dangerous condition), (2) notice to the City of the nuisance, and (3) that the City failed to take reasonable measures to correct the nuisance. *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 446-47, 55 N.E.2d 724, 733 (1944). Section 723.01, Ohio Revised Code, is reprinted in the Appendix to this Motion at p. A4.

ficient need for the insurance and indemnity demand which it makes of the press alone.¹⁰

This Court has already rejected Appellant's argument that equal protection principles, rather than First Amendment principles, apply to the insurance and indemnity requirements. In judging the constitutionality of regulations which single out the press, this Court has employed First Amendment, not equal protection, analysis:

[The] dissent analyzes this case solely as a problem of equal protection. . . . We, however, view the problem as one arising directly under the First Amendment, for, . . . the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press.

Minneapolis Star and Tribune Co., 460 U.S. at 585-86 n.7; see *City of Los Angeles v. Preferred Communications, Inc.*, 90 L. Ed. 2d 480, 488, 106 S. Ct. 2034 (1986). Thus, the Court of Appeals' decision follows this Court's prior decisions and presents no new issues.

10. Whether Appellee can afford to insure the City for \$100,000 is immaterial. Others who need or wish to use newsboxes to communicate with Lakewood's citizens may not be able to afford or acquire the insurance. As to them, mandatory insurance is a device with the potential for suppression of particular points of view. For that reason, coupled with the absence of any evidence that newsboxes pose a liability risk, the mandatory insurance requirement is an unreasonable time, place, and manner regulation. *Collin v. Smith*, 447 F. Supp. 676, 684, 686 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); see *Sect'y of State of Maryland*, 467 U.S. at 957 (where a law is challenged on its face on First Amendment grounds, the rights of third-parties may be asserted).

CONCLUSION

For the foregoing reasons, the rulings from which the City appeals are manifestly correct and present no issues which deserve this Court's plenary consideration. Therefore, Appellee respectfully moves this Court to dismiss the appeal or summarily to affirm the judgment of the Court of Appeals.

Respectfully submitted,

JAMES P. GARNER, *Counsel of Record*
KAREN B. NEWBORN
DAVID L. MARBURGER
BAKER & HOSTETLER

3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

*Attorneys for Appellee Plain
Dealer Publishing Company*

LAKEWOOD CODIFIED ORDINANCE

Ordinance No. 1-87

By: Brown, Chinnock, Gallagher,
Graham, McBride, Salmon, Wendling

AN EMERGENCY ORDINANCE to reenact Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood with the operation and effect of certain provisions therein held unconstitutional by the U.S. Sixth Circuit Court of Appeals suspended pending further appeals or exhaustion of time thereof as an interim measure to provide for the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City.

WHEREAS, the United States District Court for the Northern District of Ohio, Eastern Division held Sections 901.18 and 901.181 as presently constituted to be constitutional, but the U.S. Sixth Circuit Court of Appeals in *Plain Dealer Publishing Company vs. City of Lakewood*, Case Nos. 84-3683 and 84-3722, has held by opinion dated July 10, 1986, (rehearing *en banc* denied, September 25, 1986), that certain provisions of Section 901.181 as adopted by Ordinance No. 109-83 passed October 17, 1983, and amended by Ordinance 2-84, passed January 3, 1984, were unconstitutional in part, but otherwise held that remaining provisions of such Section to be constitutional but inoperable, and

WHEREAS, the aforesaid decision has been appealed by the City of Lakewood and this Council finds it necessary and appropriate to reenact Section 901.181 with certain provisions temporarily suspended or added and au-

thorizing the Mayor to issue rental permits under said Section pending exhaustion of any appeals by the City or its adversary, and

WHEREAS, this ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Section 901.181 of the Codified Ordinances of the City of Lakewood as adopted by Ordinance 109-83, passed October 17, 1983, and amended by Ordinance 2-84 passed January 3, 1984, be and the same is hereby reenacted and the Mayor is hereby authorized, empowered and directed to accept applications for placement for newspaper dispensing devices and issue rental permits to any applicant complying with all the provisions of said Section and as hereinafter provided for the placement of newsbooks on property of the City of Lakewood, except for the following provisions, the operation and effect of which is hereby temporarily suspended, to wit: (a) the provisions in the second paragraph of said Section 901.181 to the extent that it grants the Mayor any unbridled discretion to either grant or deny such licenses; (b) the provision of subparagraph 901.181(a), last sentence requiring that the design of such devices shall be subject to approval by the Architectural Board of Review; and (c) the provision of subparagraph 901.181(c)(5) requiring indemnification and liability insurance including the City as a named insured.

Provided further, however, that the Mayor shall not issue any such rental permit for placement of a newspaper dispensing device to be located in a handicap curb, ramp

or any other place where placement would cause any nuisance or health or safety hazard and all permits issued shall specify and be subject to the following additional conditions: (a) only newspaper dispensing devices colored bronze brown, the same color as required for other city streetscape facilities, may be installed; (b) no permanent rights shall be secured upon the granting of such rental permit by the applicant; and, (c) the City shall have the right to remove any newspaper dispensing device installed upon failure to timely renew the application or comply with any of the provisions of this Section or Section 901.181 of the Codified Ordinances after ten (10) days notice to the applicant to remove same or requiring compliance.

Section 2. The suspension and other provisions in Section 1 of this ordinance shall only remain in full force and effect pending the outcome of the City's aforementioned appeal and exhaustion of the time for any other appeal and/or rehearing and for a period of sixty (60) days thereafter, or until further act of Council.

Section 3. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 4. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall

take effect and be in force after the earliest period allowed by law.

/s/ JOHN PATRICK GALLAGHER
President

Adopted: January 5, 1987

/s/ KAREN A. DOWLING
Clerk

/s/ ANTHONY C. SINAGRA
Mayor

Approved: January 6, 1987

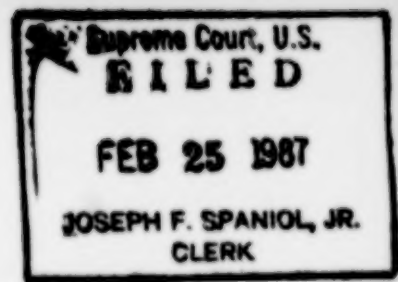
OHIO REVISED CODE

723.01 Legislative authority to have care, supervision, and control of streets.

Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance.

REPLY BRIEF

(3)
NO. 86-1042



In the Supreme Court of the
United States

October Term, 1986

CITY OF LAKEWOOD,

Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

On Appeal From The United States Court
Of Appeals For The Sixth Circuit

APPELLANT'S REPLY BRIEF

HENRY B. FISCHER, Counsel of Record
JOHN H. GIBBON
FREDERICK W. WHATLEY
WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

WILLIAM E. BLACKIE
Law Director
ROGER D. TIBBETTS
Assistant Law Director

Attorneys for Appellant
City of Lakewood

February 24, 1987

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No. 86-1042

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

CITY OF LAKEWOOD

Appellant

vs.

PLAIN DEALER PUBLISHING CO.

Appellee

APPELLANT'S REPLY BRIEF

I. SUPPLEMENTAL STATEMENT OF CASE

Due to certain arguments and inaccurate statements made by Appellee in its Motion to Dismiss Appeal or to Affirm Judgment (hereinafter referred to as Appellee's "Motion"), additional facts pertinent to this appeal should be noted by this Court.

A. SAFETY HAZARDS ARE
CREATED BY NEWSBOXES

The uncontroverted testimony at trial demonstrated that safety hazards are associated with the erection of newsboxes adjacent to city streets, to-wit: (1) Motor vehicles stop during rush hour, in violation of no-stopping ordinances, to purchase papers from newsboxes creating additional congestion and causing other vehicles to swerve to avoid the stopped vehicles; (2) Newsboxes create sight obstructions; (3) The City averages four reports per day of accidents occurring off its streets, but within its public rights-of-way, including bicycles striking objects such as mail boxes or utility poles, persons tripping on sidewalks and falling against objects placed near the

sidewalks, and pedestrians walking into traffic control devices; (4) There are daily reports of pedestrians tripping and falling on sidewalks and monthly reports of such persons striking an object placed near the sidewalks; (5) Objects not properly anchored (e.g. newsboxes with weights in them) can become missiles or projectiles if struck by a vehicle and thereby injure persons or property; (6) In addition to fire hydrants, approximately 30 objects located in the City's rights-of-way are struck by vehicles per year; (7) Newsboxes have been placed so close to curbs that doors could not be opened on parked cars, placed too close to fire hydrants, and have been located on sidewalks so as to restrict pedestrian traffic and protrude into ramps for the handicapped; and, (8) The more obstructions that are

placed in the public rights-of-way adjacent to a roadway, the greater is the "tunnel effect" which causes motor vehicle operators to pull away from the obstructions and into the next lane of traffic.

B. AESTHETIC DAMAGE IS
CAUSED BY NEWSBOXES

The uncontroverted testimony at trial demonstrated that newsboxes are commercial ventures used to increase Appellee's revenue from advertisers who place advertisements in Appellee's newspaper. Calculated to catch the eye of pedestrians and motorists much like a small billboard the name and logo of Appellee are prominently displayed on newsboxes and placards are placed on the front of the machines to advertise

contests and/or features in the newspaper.

Aesthetic problems created by newsboxes otherwise noted at trial were the visual clutter caused: (1) By several newsboxes being placed together without regard to their color or design; (2) Random placement of newsboxes on sidewalks; and, (3) Litter collecting underneath or around the newsboxes.

An expert City Planner testified that, aesthetically, it was necessary for the City to harmonize the color and design of objects placed on its rights-of-way. He also testified that all other construction of similarly sized objects within the City is subject to the same architectural review as are newsboxes.

C. OTHER OBJECTS PLACED
ON CITY PROPERTY AND
INSURANCE

All other objects currently placed on the City's treelawns and sidewalks provide essential public services to the City and its residents [See, "Jurisdictional Statement" of Appellant, at p. 7-8]. Appellee's newsboxes do not provide such services. Moreover, the items placed on City property are there pursuant to utility easements or are owned by the City. Appellee's newsboxes are privately owned and can only be placed on City property pursuant to rental agreements.

There is no evidence in the record of any rental of City property, with or without insurance, pursuant to Section

901.18,¹/ or otherwise. Insurance requirements are standard and customary in rental agreements. Appellee produced numerous insurance certificates in the amount of \$1,000,000.00 at trial. These certificates included as named insured the cities wherein Appellee's newsboxes were located. No evidence was introduced indicating that newspaper publishers were "singled out" for insurance and/or indemnity agreements relating to Lakewood's rental agreements. Nor was there any evidence of any other vendor attempting to rent City property for a similar purpose.

1. The text of §901.18 is set forth in the Appendix hereto.

II. ARGUMENT

THE QUESTIONS PRESENTED ARE
SUBSTANTIAL

Regulating the use of city property is of paramount importance to the City, and its residents. Appellee originally sought to take City property for its sole and exclusive use, free of charge and free of all regulations under the guise of a purported First Amendment right. The Sixth Circuit Court of Appeals held that Appellee could not take City property free of charge, but held that the City could not regulate the rental of its property to Appellee as it could to any other commercial lessee. Contrary to Appellee's argument, at least two substantial questions are raised by the Circuit Court's decision:

1. Since the First Amendment does not grant property rights and Appellee

must pay rent for city property it wishes to take for its sole and exclusive use, how is it that generally applicable rental provisions (e.g. requiring insurance and/or indemnity), violate the First Amendment? and,

2. By what standard are Courts to judge the validity of such rental provisions?

As to the first question, Appellee now admits that it does not have First Amendment generated property right in City property. Appellee also admits, albeit tacitly, that it is within the exclusive authority of the City to grant Appellee a lease-hold interest in City property. Concomitant with the authority to grant a lease hold interest,

however, is the authority to require Appellee to meet generally applicable rules and regulations to protect the City and its residents from any anticipated (or unanticipated) harm caused by Appellee's use of City property.

The City submits that making a property right available to Appellee does not implicate the First Amendment any more than any other available governmental property right, to-wit: the City may not deny and/or terminate a property right it has created based on, or related to, content [See, Pickering v. Board of Education, 391 U.S. 563 (1968); Board of Regents v. Roth, 408 U.S. 564 (1972); Mount Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977); and, all other cases cited at

pp. 13-14 of the City's "Jurisdictional Statement"].

In this case, Appellee has admitted that the City's newsbox ordinance is content neutral. Thus, the subject newsbox regulations never violated any of Appellee's First Amendment rights.^{2/}

The second question concerning the proper standard to judge such rental provisions is of real and substantial importance to cities attempting to regulate the use of their property. To date, the Courts that have addressed this issue have provided inadequate analysis. The cases cited by Appellee,

2. As noted in the City's Jurisdictional Statement, at p. 8, there are numerous alternate, and adequate, channels of communication by which Appellee sells its newspapers without any regulation whatsoever by the City.

at p. 5, n. 1 of its Motion, are perfect examples of such inadequate analysis. All of these cases analogize newsboxes to Alma Lovell distributing her magazine, "The Golden Age", door-to-door in the City of Griffin, Georgia, or similar cases [e.g. Schneider v. State, 308 U.S. 147 (1939); Murdock v. Pennsylvania, 319 U.S. 105 (1943); and, Martin v. City of Struthers, 319 U.S. 141 (1943)].^{3/}

In the instant matter, the only person(s) having rights equivalent to Alma Lovell's would be the newspaper

3. See e.g., Gannett Co. v. City of Rochester 330 N.Y.S.2d 648 (Sup. Ct. 1972) (cited by Appellee at p. 7 of its Motion) wherein the Court stretches this analogy to its breaking point by declaring a newsbox to be functionally safer than a newsboy. It should be noted that a newsbox cannot step out of the way of a wayward cyclist or pedestrian and never goes "home".

delivery person(s) who deliver Appellee's newspaper, door-to-door. The subject ordinance, however, does not regulate persons. The ordinance only regulates stationary structures that sell a very small portion of Appellee's newspapers and are erected on, and affixed to, City property. Thus, the analysis of Lovell v. Griffin, 303 U.S. 444 (1937), and its progeny, are inapposite. Additionally, discussions of this issue by these Courts often equate "newsboxes" to "newspapers". A "newsbox" is no more a "newspaper", than a "bookstore" is a "book".

Thus, as there is an increasing body of law using incorrect analysis in determining a City's right to regulate its own property, it is of substantial importance that this Court set forth the

correct standards for judging the validity of newsbox regulations.

The rental provisions at issue in this case demonstrate the need for this Court to definitively answer the questions raised by the Circuit Court's decision. The City's requirement of indemnity insurance is a rental provision deemed necessary by almost all commercial lessors. Appellee argues that the City did not prove that newsboxes cause safety or liability hazards [See Appellee's Motion at p. 16). As stated above, however, the uncontroverted testimony at trial was that there are numerous accidents involving objects placed along and/or in the City's tree lawns and sidewalks, and, with the addition of more objects in the tree lawns and sidewalks, more accidents will

occur. Thus, the City is entitled to have itself indemnified by an entity commercially using the City's property and causing an increased risk of injury to persons and property.

Moreover, Appellee itself proved that newsboxes present a liability hazard. Appellee insures its newsboxes in the amount of \$1,000,000.00 and indemnifies, and names as additional insureds, other cities in which Appellee's newsboxes are located. Apparently, Appellee would have this Court believe that it expends the sum necessary to carry \$1,000,000.00 in liability insurance and name other cities as additional insureds for items that create no risk.

Appellee further argues that the indemnity requirement "singles out" the

press [See, Appellee's Brief at p. 17]. However, other objects currently on City property are City owned or are located on City property pursuant to easements. They provide essential public services. No evidence was provided as to whether these objects are insured. On the other hand, privately-owned newsboxes provide no essential public services and are permitted pursuant to rental agreements. There is no evidence in the record of any other City rental agreements pursuant to §901.18, or otherwise. The evidence does demonstrate that insurance and/or indemnity agreements are customary, even to Appellee, who, without undue burden, provides insurance coverage for other cities. It was clearly erroneous for the Sixth Circuit Court of Appeals to invalidate the insurance

requirement based on the First Amendment, and contrary to well-settled "equal protection" principles, under the circumstances of this case.

As conceded by Appellee at p. 15 of its Motion and noted by this Court in Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575 (1983):

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.

Id. at 581. As any other commercial leasee of City property would be required to provide insurance and/or indemnify the City, such a requirement is a "generally applicable economic regulation" that does not create "constitutional problems."

Similarly, Appellee admits that it must submit the design of its newsboxes to the Architectural Board of Review [See, Appellee's Motion at p. 14]. The only question raised by Appellee is the scope of Architectural Board of Review's discretion. All structures erected within the City, however, are subject to the same review, under the same standards (for the protection of property values) as are applied to newsboxes. As held in Reid v. Architectural Board of Review, 119 Ohio App. 67 (Cuy. Cty. App. Court 1963), an ordinance such as the City's contains all of the criteria and standards reasonably necessary for the Board to carry out its duties. Thus, the Architectural Board of Review's discretion is not limitless or standardless and this requirement is merely a

"generally applicable economic regulation."

Finally, as to the Mayor's discretion, as proffered at trial, it is the City's intent, and is specifically stated in the ordinance, that the Mayor must grant a rental permit or state a reason for denial, which reason must be constitutional, i.e. he must demonstrate that the placement of a newsbox at a specific site would cause a hazard to the health, safety or welfare of the City's residents. The City cannot be expected to foresee and anticipate all conditions at all sites suitable for newsboxes within its 3.5 square miles of territory. Recognition of this fact is not a "failure to draft [its] regulations carefully." Clearly, the Mayor's

discretion must be constitutionally exercised and is so limited.

III. CONCLUSION

For the reasons set forth in this Reply Brief and the City's earlier Jurisdictional Statement, this Court should give plenary consideration to this Appeal.

Respectfully submitted,

Henry B. Fischer, Counsel
of Record
John H. Gibbon
Frederick W. Whatley

WALTER, HAVERFIELD,
BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

William E. Blackie, Law
Director

Roger D. Tibbetts
Asst. Law Director
City of Lakewood
12650 Detroit Avenue
Lakewood, Ohio 44107
(216) 521-6580

Attorneys for Appellant,
The City of Lakewood

APPENDIX A

Section 901.18 of Lakewood's Codified Ordinances was amended to read as follows:

901.18 ERECTING BUILDINGS OR
STRUCTURES ON PUBLIC
GROUND

(a) No person shall erect, place, or caused to be erected or placed or permit to remain, any building, structure, or device of any nature upon any street, lane, alley or public ground within the city except with the consent of the owner thereof and where permitted by statutes of the State of Ohio and the Ordinances of the City of Lakewood, including, but not limited to, zoning provisions.

(b) No person, firm, or corporation shall exclusively use property of the City of Lakewood held for use by the general public except pursuant to rental agreements or permits including provision for the payment of a reasonable rental as may be authorized by ordinance. The term "exclusive use", as used in this Section shall mean continuous use of property in the manner hereinabove stated to the exclusion or limitation of the general public for a period of thirty (30) minutes or longer. Applications for rental

A2

agreements or permits for the exclusive use of public property of the City of Lakewood shall be made to the City Council, except as otherwise permitted by ordinance.

**JOINT
APPENDIX
VOL. I**

No. 86-1042

Supreme Court, Ohio
FILED
MAY 16 1987

In the Supreme Court of the United States

— October Term, 1986 —

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX
Volume I

JAMES P. GARNER <i>Counsel of Record</i>	HENRY B. FISCHER <i>Counsel of Record</i>
KAREN B. NEWBORN	JOHN H. GIBBON
DAVID L. MARBURGER	FREDERICK W. WHATLEY
BAKER & HOSTETLER	WALTER, HAVERFIELD, BUESCHER
3200 National City Center	& CHOCKLEY 1215 Terminal Tower
Cleveland, Ohio 44114	Cleveland, Ohio 44113
(216) 621-0200	(216) 781-1212
<i>Attorneys for Appellee</i>	WILLIAM E. BLACKIE
<i>Plain Dealer</i>	<i>Law Director</i>
<i>Publishing Company</i>	ROGER D. TIBBETTS
	<i>Assistant Law Director</i>
	City of Lakewood
	12650 Detroit Avenue
	Lakewood, Ohio 44107
	(216) 521-6580
	<i>Attorneys for Appellant</i>
	<i>City of Lakewood</i>

Jurisdictional Statement Filed December 23, 1986
Jurisdiction Noted on March 2, 1987

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No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE PLAIN DEALER PUBLISHING COMPANY,
Plaintiff,
vs.
CITY OF LAKEWOOD,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1/ 5/83	1	COMPLAINT filed. Summons, complaint and notice re: magistrate issued to pltf's counsel.
2/18/83	4	ANSWER of deft to the complaint, filed. c/m 2-18-83
5/20/83	5	MOTION of pltf for summary judgment, with brief in support, filed. c/m 5/20/83
6/16/83	7	BRIEF of deft in Opposition to motion of pltf for summary judgment, filed. c/m 6/15/83
8/18/83	8	MEMORANDUM & ORDER that pltf's motion for summary judgment is Granted; further it is declared and adjudged that \$901.18 of the Codified Ordinances of the City of Lakewood is

DATE	NR.	PROCEEDINGS
		unconstitutional and void, insofar as it prohibits the Plain Dealer Publishing Co. from placing coin operated newspaper boxes on public property in the City of Lakewood, further the Court will hold the matter of permanent injunction for 60 days in order to give the City of Lakewood the opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with pltf's First Amendment Rights, filed. White, J. c/m 8/18/83 (8/18/83)
10/26/83	11	AMENDED ANSWER of deft, filed. c/m 10/25/83
12/27/83	12	MOTION of pltf. for preliminary injunction with Brief in support filed. c/m 12/27/83.
12/28/83	14	AMENDED COMPLAINT for Declaratory and Preliminary & Permanent Injunctive relief, by Pltf. Plain Dealer Publishing Company, filed. c/m 12/27/83.
1/20/84	17	ANSWER of deft to the amended complaint, filed. c/m 1/20/84
1/23/84	18	BRIEF of deft in Opposition to motion for temporary injunction, filed. c/m 1/23/84
4/11/84	35	MINUTES of proceedings, filed. White, J. r, Thompson (Court trial commenced and not concluded; adj to 4/12/84.)

DATE	NR.	PROCEEDINGS
4/12/84	36	MINUTES of proceedings, filed. White, J. r, Thompson (Trial to the Court continued and concluded; amended findings of fact and conclusions of law to be filed by 4/20/84.)
4/20/84	37	ADDITIONAL PROPOSED Findings of Fact and Conclusions of law of deft City of Lakewood, filed. c/m 4/20/84
7/12/84	44	MEMORANDUM & ORDER FILED. White, J. Findings of fact and Conclusions of Law set forth. Judgment is for deft, deft to pay costs.
7/19/84	45	ORDER that judgment is entered in favor of deft and against the pltf; pltf's complaint is dismissed at deft's costs, filed. - White, J. c/m/ 7/19/84 (7/19/84)
8/14/84	46	NOTICE of Appeal by pltf, filed. in re: 7/19/84. c/m Garner, Fischer & USCA. (n. 8/16/84).

Nos. 84-3683 & 86-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,

*Plaintiff-Appellant,**Cross-Appellee,*

vs.

CITY OF LAKEWOOD,

*Defendant-Appellee,**Cross-Appellant.*

RELEVANT DOCKET ENTRIES

FILINGS-PROCEEDINGS

1984

- 08/21 1 Copy Notice of Appeal, filed; and cause docketed.
- 09/04 5 Copy Notice of Cross Appeal, filed; and cause docketed.

1985

- 01/21 CERTIFIED RECORD (02 vol. pleadings, 01 vol. trans. [see 84-3675]; filed
- 01/21 9 TRANSCRIPT ORDER from court reporter (R. Thompson) transcript filed in district court on 1/14/85; 231 pgs - 1 vol.
- 03/05 BRIEF (11) appellant (m-03/04)
- 04/04 11 MOTION: extension appellee/cross-appellant (Lakewood) brief to 04/29/85 (m-04/03) motion granted to 4/29/85 JPH/kmp
- 04/29 BRIEF (10) appellee (m-04/26)
- 05/29 BRIEF (10) appellant/cross-appellee (m-05/29)

FILINGS-PROCEEDINGS

- 06/13 REPLY BRIEF (11) (City of Lakewood) (m-06/12)
- 06/19 JOINT APPENDIX VOLS I, II, III IV (m-6/18) [84-3683/3722/3765]
- 12/05 CAUSE argued by Garner for appellant, by Fischer for appellee and case submitted to the Court (Before: Keith, Kennedy and Unthank, JJ.)

1986

- 07/10 18 JUDGMENT: affirmed in part, reversed in part, each party to bear its own costs (Keith, Kennedy and Unthank, JJ.)
- 07/10 19 OPINION by Keith, J., [Unthank, J., dissenting]
- 07/24 20 PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (21) filed by appellant (m-07/23)
- 08/21 21 LETTER/ from 6th Cir. to appellee/cross-appellant requesting 20 copies of response to entry #20 by 9/4/86
- 09/04 22 RESPONSE (20) of appellee/cross-appellant to petition for rehearing (m-9/3)
- 09/25 23 ORDER: petition for rehearing en banc denied (Keith, Kennedy and Unthank, JJ.)
- 10/17 24 MANDATE issued (No costs taxed)
- 10/17 Opinion with mandate
- 12/18 25 NOTICE OF APPEAL to the Supreme Court filed by appellee

1987

- 01/13 26 NOTICE of filing an appeal (S. Ct. No. 86-1042) 12/23/86

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Filed January 5, 1983)

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief. In this action plaintiff Plain Dealer Publishing Company seeks a declaration that Section 901.18 of the Codified Ordinances of the City of Lakewood, Ohio is an unconstitutional interference with plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution. The statutory and jurisdictional bases for this action are 28 U.S.C. §§2201 and 2202; 28 U.S.C. §§1331 and 1343 and 42 U.S.C. §§1983 and 1988.

2. Venue properly lies in this district pursuant to 28 U.S.C. §1391.

PARTIES

3. Plaintiff is a corporation duly organized and existing pursuant to the laws of the State of Ohio. It is in the business of publishing and selling "The Plain Dealer", a daily newspaper sold throughout the Cleveland metropolitan area and elsewhere.

4. Defendant City of Lakewood is a municipal corporation located in Cuyahoga County, Ohio and a political subdivision of the State of Ohio.

FIRST COUNT

5. Plaintiff incorporates paragraphs 1 through 4 above as though fully rewritten herein. Defendant has enacted Section 901.18 of the Codified Ordinances of the City of Lakewood. Said section reads:

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

6. Plaintiff uses coin operated vending machines to distribute the Plain Dealer.

7. Plaintiff has attempted to place its coin operated vending machines on public property within defendant's corporate limits.

8. Defendant has prohibited plaintiff from placing its coin operated newspaper vending machines on any public property within defendant's corporate limits as evidenced by letter of May 21, 1982 from its Law Director, a copy of which is attached hereto and made part hereof as Exhibit A. Defendant has acted under color of state law in prohibiting plaintiff from placing coin operated newspaper vending machines on any public property. Defendant has based its blanket prohibition on its official policy as enacted in Section 901.18 of its Codified Ordinances.

9. Section 901.18 of the Codified Ordinances of Lakewood, Ohio operates as a blanket prohibition against newspaper vending machines on public property in Lakewood.

10. The freedom of the press and the due process rights established in the First and Fourteenth Amendments of the United States Constitution protect the means of distribution of a newspaper as well as the contents and the ideas expressed therein.

11. The blanket prohibition in Section 901.18 of the Codified Ordinances of Lakewood, Ohio is unconstitutional as applied to plaintiff because it unreasonably interferes with plaintiff's ability to distribute newspapers. Accordingly, Section 901.18 is in direct conflict with plaintiff's freedom of press and due process rights guaranteed under the First and Fourteenth Amendments of the United States Constitution.

12. As the result of defendant's enactment of Section 901.18 of its Codified Ordinances and the application of said section of the Codified Ordinances, plaintiff is being arbitrarily and unreasonably prevented from placing its coin operated newspaper vending machines on any public property within defendant's corporate limits, and is thereby being done immediate and irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter an Order:

1. declaring that Section 901.18 of the Codified Ordinances of Lakewood, Ohio is unconstitutional as applied to plaintiff because it interferes with plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution;
2. declaring that plaintiff has the constitutional right to place its coin operated newspaper vending machines at reasonable locations upon public property in the City of Lakewood, Ohio;
3. permanently enjoining defendant from enforcing Section 901.18 of the Codified Ordinances of the City of Lakewood against plaintiff;

4. awarding plaintiff attorneys' fees and other costs incurred in the prosecution of this matter; and
5. awarding such other equitable and legal relief as this Court may deem appropriate.

Respectfully submitted,

BAKER & HOSTETLER
/s/ KAREN B. NEWBORN
JAMES P. GARNER
RICHARD R. HOLLINGTON
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200
Attorneys for Plaintiff

EXHIBIT A

CITY OF LAKEWOOD, OHIO
12650 Detroit Avenue ° 44107 ° ° ° 216/521-7580

William E. Blackie
Director of Law

Roger D. Tibbets
Assistant Law Director

May 21, 1982

Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114

ATTENTION: Richard R. Hollington

Dear Mr. Hollington:

Your letter of February 18, 1982, directed to Mayor Sinagra regarding the request of the Plain Dealer to locate newspaper dispensing machines on the public right of way within the City of Lakewood was referred to this Department for reply.

We have reviewed the Memorandum of Law dated December 3, 1981, which you forwarded, and I would advise that it is the City's position that notwithstanding the cases cited therein, Lakewood has the right to prohibit vending machines from being placed on the public ground for the purpose of selling newspapers for profit.

I respectfully submit that in my opinion, a meeting with Plain Dealer officials would serve no useful purpose.

Very truly yours,

/s/ WILLIAM E. BLACKIE
William E. Blackie

WEB:seg

CC: Anthony C. Sinagra, Mayor

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

ANSWER

(Filed February 18, 1983)

FIRST DEFENSE

1. The Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

2. Defendant admits the jurisdiction and venue allegations of Paragraphs 1 and 2.

3. Defendant admits the allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. Defendant admits the allegations contained in Paragraph 4 of the Plaintiff's Complaint.

5. Defendant admits the allegations contained in Paragraph 5 of the Plaintiff's Complaint.

6. Defendant admits the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

7. Defendant admits the allegations contained in Paragraph 7 of the Plaintiff's Complaint.

8. Defendant admits the allegations contained in Paragraph 8 of the Plaintiff's Complaint.

9. Defendant admits the allegations contained in Paragraph 9 of the Plaintiff's Complaint.

10. Defendant denies the allegations contained in Paragraph 10 of the Plaintiff's Complaint.

11. Defendant denies the allegations contained in Paragraph 11 of the Plaintiff's Complaint.

12. Defendant denies the allegations contained in Paragraph 12 of the Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

In further answer and by way of affirmative defense, Defendant states the following:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff has failed to exhaust its administrative remedies.

SECOND AFFIRMATIVE DEFENSE

2. Defendant's action is a valid exercise of its police power.

THIRD AFFIRMATIVE DEFENSE

3. Defendant's actions do not prevent the Plaintiff from the free exercise of the freedom of the press.

FOURTH AFFIRMATIVE DEFENSE

4. The act of placing coin operated newspaper vending machines on a public sidewalk as prohibited in 901.18 of the Lakewood Codified Ordinances is not constitutionally protected by the Ohio or Federal Constitution.

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiffs have an adequate remedy at law.

WHEREFORE Defendant, City of Lakewood, having fully answered demands Plaintiff's Complaint be dismissed.

/s/ WILLIAM E. BLACKIE
Law Director

/s/ ROGER D. TIBBETTS
Asst. Law Dir.
City of Lakewood
12650 Detroit Avenue
Lakewood, Ohio 44107
(216) 521-7580

No. C83-63

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.,
Plaintiff,
vs.

CITY OF LAKEWOOD,
Defendant.

MEMORANDUM AND ORDER

(Filed August 18, 1983)

This action for declaratory and injunctive relief arises under the Civil Rights Act of 1871, 42 U.S.C. §1983 and the Courts Declaratory Judgment authority, 28 U.S.C. §2201 and §2202. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1331 and §1343(3). This matter is before the Court upon plaintiff's motion for summary judgment and defendant's brief in opposition.

The plaintiff, Plain Dealer Publishing Company, uses coin operated vending machines to distribute its newspapers. It has attempted to place these coin operated vending machines on public property within the City of Lakewood. However the City has prohibited this type of newspaper distribution on public property within the City limits in reliance on §901.18 of the Codified Ordinances of the City of Lakewood. The plaintiff alleges that this ordinance operates as a blanket prohibition against newspaper vending machines and violates plaintiff's freedom of press and its due process rights under the First

and Fourteenth Amendments to the United States Constitution.

Section 901.18 of the Codified Ordinances of the City of Lakewood provides:

"No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City."

The defendant contends that Ordinance 901.18 was enacted to protect the health, safety, welfare and morals of the people of Lakewood and also that the ordinance does not effect plaintiff's constitutional rights because there are other means of distributing the newspaper such as home delivery or mail delivery, and it is available in various stores throughout the city.

The United States Supreme Court has held that the right to circulation is as essential to freedom of the press as the right to publish. *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct 666, 82 L.Ed 949 (1938). There is also right of access to the streets for dissemination of information. *Hague v. CIO*, 307 U.S. 496, 59 S.Ct 954, 83 L.Ed 1423 (1939). Right of access includes the right to distribute printed material. *Flower v. United States*, 407 U.S. 197, 92 S.Ct 1842, 32 L.Ed 2d 653 (1972), *Schneider v. State*, 308 U.S. 147, 60 S.Ct 146, 84 L.Ed 155 (1939).

In *Philadelphia News, Inc., v. Borough Council, Mayor, Manager and Director of Public Works of the Borough of Swarthmore*, 381 F.Supp 228 (E.D.F. PA 1974) the Borough enacted an ordinance prohibiting placement of newspaper boxes on sidewalk strips in certain areas or limiting the boxes to a three foot strip of sidewalk adjacent to premises within the business district during business

hours providing the boxes were placed by the tenant, owner, or occupant of the business establishment which customarily sold newspapers. The Court held the ordinance unconstitutional stating that the diverse legitimate interests of the City under its police power must be weighed against the rights guaranteed under the First and Fourteenth Amendments. The desire to keep public sidewalks free of the boxes must be balanced not only against the right of the plaintiff to distribute newspapers but the right of the public to have free access as long as the means of distribution do not create real hazards for the citizens of the borough.

A California Court of Appeals also held unconstitutional an ordinance totally banning newspaper boxes. *Reimer v. City of El Cajon*, 125 CA Rptr 116, 52 CA App 3rd 441 (1975). The Court in *Reimer* and in *Philadelphia News* considered the fact that there were other means available for distribution finding that these alternative means do not justify a total restriction on newspaper boxes. See *California Newspaper Publishers, Inc., v. City of Burbank*, 123 CA Rptr. 880, 51 CA App 3rd 50 (1975). The Court in *California Newspapers* granted plaintiff summary judgment without requiring the plaintiff to demonstrate that the ordinance effected distribution of newspapers or that an affirmative need existed for news racks.

This is not to say that one has the absolute right to use city streets for communication of views. *Heffron v. International Society for Krishna Consciousness*, U.S., 101 S.Ct 2559 (1981). The Supreme Court has upheld reasonable time, place, and manner regulations as long as they are narrowly drawn and applied equally and serve a significant governmental interest without necessarily interfering with first amendment rights. See

Buckley v. Valeo, 425 U.S. 1, 96 S.Ct 612, 46 L.Ed 2d 659 (1975), *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed 2d 222 (1972), *Miller Newspapers, Inc., v. City of Keene*, 546 F. Supp 831 (D. N. Hamp. 1982). The City under its police power may enact narrowly drawn reasonable time, place, and manner restrictions "provided they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest and that in doing so they leave open ample alternative channels of communication." *Miller Newspapers v. City of Keene*, *supra*, quoting from *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1917, 1930, 48 L.Ed. 2d 346 (1976). In *Philadelphia News* the Court held that the borough was able to regulate the use of newspaper boxes on sidewalks so long as their regulations were reasonable. For example, narrow regulations as to size and location could be enacted if the city feared the boxes would block pedestrian traffic. If traffic conjection or illegal parking or stopping by motorists to purchase a newspaper is a problem regulations concerning location of the boxes in relation to the roadway could be formulated. The Court even considered that aesthetically, size and appearance and the type of format or permissible identification or advertising could be regulated. See *Southern New Jersey Newspapers, Inc., v. State of New Jersey Department of Transportation*, 542 F.Supp 173 (D. NJ 1982).

Defendant argues that the Codified Lakewood Ordinance §901.18 is within its police power and thus can impinge upon constitutional rights if it substantially furthers a state goal. Safety and aesthetics are considered substantial state goals. However defendant has not explained why there would be a safety hazard or how the community would be effected if newspaper boxes were allowed on

Lakewood city streets. As the Court in *Southern New Jersey Newspapers* found, mere speculation is not enough to justify broad restrictions. The fact that a reasonable means of newspaper distribution has been totally banned is in itself a violation of the First and Fourteenth Amendments regardless of whether Lakewood residents may be able to receive or purchase the Plain Dealer by other means. Section 901.18 of the Codified Lakewood Ordinances operates as a blanket prohibition against placement of plaintiff's newspapers vending machines on public property and must be considered a violation of the First and Fourteenth Amendments as it pertains to the Plain Dealer.

Accordingly, plaintiff's motion for summary judgment is GRANTED. It is hereby declared and adjudged that §901.18 of the Codified Ordinances of the City of Lakewood is unconstitutional and void, insofar as it prohibits the Plain Dealer Publishing Company from placing coin operated newspaper boxes on public property in the City of Lakewood. The Court will hold the matter of permanent injunction for sixty (60) days in order to give the City of Lakewood the opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with plaintiff's First Amendment rights.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

FIRST AMENDED ANSWER

(Filed October 26, 1983)

FIRST DEFENSE

1. The Complaint fails to state a claim upon which relief may be granted against Defendant herein answering.

SECOND DEFENSE

2. Defendant herein answering admits the allegations contained in Paragraphs 1 through 7, inclusive, of the Complaint.

3. Defendant herein answering denies the allegations contained in Paragraphs 8 through 12, inclusive, of the Complaint, and each and every other allegation of the Complaint not herein expressly admitted in the within First Amended Answer, but admits as follows:

(A) The City of Lakewood is a municipal corporation chartered under the Constitution and laws of the State of Ohio, including Article XVIII, Section 3, of the Ohio Constitution, the "home rule" amendment, which authorizes a municipality to exercise all powers of local self-government and to adopt and enforce, within their limits, police regulations not in conflict with the general laws of Ohio.

- (B) On the seventeenth day of October, 1983, the Council of the City of Lakewood adopted Ordinance Nos. 108-83 and 109-83, certified copies of which are attached and incorporated herein by reference, the same as though fully rewritten at length, whereby former Lakewood Codified Ordinances Section 901.18 has been repealed and replaced by a new amended Codified Ordinance Section 901.18 and a new Codified Ordinances Section 901.181, entitled "Newspaper Dispensing Devices; Permit and Application", has been enacted and added.
- (C) The opinion letter of the Law Director of the City of Lakewood, Exhibit "A", attached to the Complaint, was written respecting the Plaintiff's request to place newspaper dispensing devices along the public right-of-way prior to the passage of Ordinance Nos. 108-83 and 109-83 on October 17, 1983.

FIRST THROUGH FIFTH, INCLUSIVE, AFFIRMATIVE DEFENSES

4. The First through Fifth Affirmative Defenses, inclusive, of the Original Answer of the City of Lakewood, filed on or about February 18, 1983, are incorporated herein by reference, the same as though fully rewritten at length.

SIXTH AFFIRMATIVE DEFENSE

5. The allegations of Paragraphs 1 through 4 of the within First Amended Answer are incorporated herein by reference, the same as though fully rewritten at length.

6. The claims of Plaintiff's Complaint are moot.

WHEREFORE, having fully answered, the City of Lakewood demands that the within Complaint be dismissed.

WILLIAM E. BLACKIE
Law Director

ROGER D. TIBBETTS
Assistant Director of Law
City of Lakewood
12650 Detroit Avenue
Lakewood, Ohio 44107
Telephone: (216) 521-7580

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

**AMENDED COMPLAINT FOR DECLARATORY
AND PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF**

(Filed December 27, 1983)

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief. In this action plaintiff Plain Dealer Publishing Company seeks a declaration that Section 901.18 as amended effective October 17, 1983 (hereinafter Amended Section 901.18) and Section 901.181 of the Codified Ordinances of the City of Lakewood, Ohio are unconstitutional interferences with plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution. The statutory and jurisdictional bases for this action are 28 U.S.C. §§2201 and 2202; 28 U.S.C. §§1331 and 1343 and 42 U.S.C. §§1983 and 1988.

2. Venue properly lies in this district pursuant to 28 U.S.C. §1391.

PARTIES

3. Plaintiff is a corporation duly organized and existing pursuant to the laws of the State of Ohio. It is in the business of publishing and selling "The Plain Dealer", a daily newspaper sold throughout the Cleveland metropolitan area and elsewhere.

4. Defendant City of Lakewood is a municipal corporation located in Cuyahoga County, Ohio and a political subdivision of the State of Ohio.

FIRST COUNT

5. Plaintiff incorporates paragraphs 1 through 4 above as though fully rewritten herein. On August 18, 1983 this Court entered an order declaring Section 901.18 of the Codified Ordinances of the City of Lakewood unconstitutional. The Court held the matter of a permanent injunction for 60 days to give the defendant an opportunity to enact a reasonable ordinance governing the placement of coin operated newspaper vending machines on public property.

6. On October 17, 1983 defendant passed Ordinances Nos. 108-83 and 109-83 amending Section 901.18 of the Codified Ordinances of the City of Lakewood and enacting new Section 901.181 of the Codified Ordinances of the City of Lakewood, respectively. On October 18, 1983 the ordinances were approved by the Mayor of the City of Lakewood and went into immediate force and effect. Copies of Ordinance Nos. 108-83 and 109-83 are attached* to this Amended Complaint and incorporated herein as though fully rewritten.

7. The provisions in Amended Section 901.18 and Section 901.181 (1) create a licensing system and licensing fee; (2) leave discretion in the Mayor to decide whether coin operated newspaper vending machines can be placed on the public streets, where they can be located and the amount of the permitting fee; (3) require a hold harmless

*The ordinances are omitted here, but can be found at pp. 265-274 of the Joint Appendix.

agreement and liability insurance; (4) create physical requirements for coin operated newspaper vending machines; (5) create numerous location requirements for coin operated newspaper vending machines; and (6) require that the owner of coin operated newspaper vending machines keep the surrounding area clean.

8. Plaintiff uses coin operated newspaper vending machines to distribute "The Plain Dealer."

9. Plaintiff has attempted to place its coin operated newspaper vending machines on public property within defendant's corporate limits.

10. Defendant has prohibited plaintiff from placing its coin operated newspaper vending machines at reasonable locations on public property within defendant's corporate limits and additionally has imposed unreasonable conditions on the placement of plaintiff's coin operated newspaper vending machines at any location on public property in the City of Lakewood.

11. Defendant has acted under color of state law in prohibiting plaintiff from placing coin operated newspaper vending machines at reasonable locations on public property and in imposing unreasonable conditions on the placement of coin operated newspaper vending machines at any location on public property. Defendant has based its prohibition on its official policy as enacted in Amended Section 901.18 and Section 901.181 of its Codified Ordinances.

12. The freedom of the press and the due process rights established in the First and Fourteenth Amendments of the United States Constitution protect the means of distribution of a newspaper as well as the contents and the ideas expressed therein.

13. The prohibitions and unreasonable conditions in Amended Section 901.18 and Section 901.181 of the Codified Ordinances of Lakewood, Ohio are unconstitutional as applied to plaintiff because they interfere with plaintiff's ability to distribute newspapers, subject plaintiff to unlimited administrative discretion and are not the narrowest possible regulation to meet a substantial state interest. Accordingly, Amended Section 901.18 and Section 901.181 are in direct conflict with plaintiff's freedom of press and due process rights guaranteed under the First and Fourteenth Amendments of the United States Constitution.

14. As the result of defendant's enactment of Amended Section 901.18 and Section 901.181 of its Codified Ordinances and the application of said sections, plaintiff is being arbitrarily and unreasonably prevented from placing its coin operated newspaper vending machines at reasonable locations on public property within defendant's corporate limits, and is being subjected to unreasonable conditions for the placement of coin operated newspaper vending boxes at any location on public property in defendant corporate limits and is thereby being done immediate and irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter an Order:

1. declaring that Amended Section 901.18 and Section 901.181 of the Codified Ordinances of Lakewood, Ohio are unconstitutional as applied to plaintiff because they interfere with plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution;

2. declaring that plaintiff has the constitutional right to place its coin operated newspaper vending machines at reasonable locations under reasonable conditions upon public property in the City of Lakewood, Ohio;
3. preliminarily and permanently enjoining defendant from enforcing Amended Section 901.18 and Section 901.181 of the Codified Ordinances of the City of Lakewood against plaintiff;
4. awarding plaintiff attorneys' fees and other costs incurred in the prosecution of this matter; and
5. awarding such other equitable and legal relief as this Court may deem appropriate.

JAMES P. GARNER

RICHARD R. HOLLINGTON

KAREN B. NEWBORN

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

Attorneys for Plaintiff

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

**ANSWER OF DEFENDANT, CITY OF LAKEWOOD,
TO FIRST AMENDED COMPLAINT
OF PLAINTIFF**

(Filed January 20, 1984)

FIRST DEFENSE

1. The Complaint fails to state a claim upon which relief may be granted against Defendant herein answering.

SECOND DEFENSE

2. Defendant herein answering admits the allegations contained in Paragraphs 2, 3, 4, and 6 of the First Amended Complaint.

3. Defendant herein answering denies the allegations contained in Paragraphs 1, 5, and 7 through 14, inclusive, of the First Amended Complaint, and each and every other allegation of the First Amended Complaint not herein expressly admitted in the within Answer to the First Amended Complaint, but admits as follows:

(A) The City of Lakewood is a Municipal Corporation chartered under the Constitution and the laws of the State of Ohio, including Article XVIII, Section 3, of the Ohio Constitution, the "Home Rule" Amendment, which authorizes a municipality to exercise all powers of local self government and to adopt and enforce, within their

limits, police regulations not in conflict with the general laws of Ohio.

(B) On or about August 18, 1983, this Court entered an Order declaring the Section 901.18 of the Codified Ordinances of the City of Lakewood then in effect unconstitutional, but held the matter of a permanent injunction for sixty (60) days in order to give the City of Lakewood the opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with Plaintiff's First Amendment rights. On October 17, 1983, the Council of the City of Lakewood adopted Ordinance Nos. 108-83 and 109-83, certified copies of which were attached and incorporated by reference to the First Amended Answer of the City of Lakewood filed with the Court and such Ordinances are incorporated herein by reference, the same as though fully rewritten at length.

(C) The opinion letter of the Law Director of the City of Lakewood, Exhibit "A", attached to the original Complaint, was written respecting the Plaintiff's request to place newspaper dispensing devices along the public right-of-way prior to the passage of said Ordinance Nos. 108-83 and 109-83 on October 17, 1983.

(D) On the 3rd day of January, 1984, the Council of the City of Lakewood adopted Ordinance No. 2-84, a certified copy of which is attached hereto* and incorporated herein by reference, the same as though fully rewritten at length, whereby the aforesaid Section 901.181 adopted by Ordinance 109-83 was amended after review of objections orally made by counsel for Plaintiff in said Ordinance No. 109-83.

*Ordinance No. 2-84 is omitted here in printing, but can be found at 275 of the Joint Appendix.

(E) The Plaintiff distributes and has distributed for some time newspapers throughout the City of Lakewood without any interference from the City of Lakewood, in which City said newspapers are sold and have been sold for some time through stores, home delivery service, mail, coin-operated newspaper vending machines on public property, and otherwise.

(F) Upon the installation and maintenance of coin-operated newspaper dispensing devices on real property, newspapers are purchased by other persons for a price deposited in such device and collected by the Plaintiff whereby Plaintiff is engaged in selling newspapers, a commercial use of real property.

(G) By the underlying intent and express terms of Lakewood Ordinance Nos. 108-83 and 109-83 as amended by Ordinance No. 2-84, with consent of the owner other than the City of Lakewood the Plaintiff may erect coin-operated newspaper dispensing devices upon public property subject to zoning, the Mayor of the City of Lakewood has no discretion and is mandated to grant rental permits for erection of coin-operated newspaper dispensing devices on property owned by the City of Lakewood along the streets at locations in conformity with the terms of Codified Ordinance Section 901.181, as amended, and Plaintiff may apply to the Council for rental of other City property for such purpose.

(H) Plaintiff has not at any time applied for or been denied a rental permit to use real property of the City of Lakewood for erection of coin-operated newspaper dispensing devices.

(I) Plaintiff has had and continues to have ample alternative channels for distribution and sale of its newspapers within the City of Lakewood exclusive of utilizing City owned property for such purpose.

THIRD DEFENSE

4. The allegations of Paragraphs 1 through 3 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

5. The City of Lakewood is mandated by Ohio Revised Code Section 723.01 to maintain the streets, sidewalks, and public ways open to the public free of nuisance, is held civilly liable by such Section for failure of such duty, and its broad discretion in discharging this governmental obligation should not be bridled nor should it be exposed to additional liability without indemnification by any private commercial use on such City owned property by Plaintiff or otherwise.

FOURTH DEFENSE

6. The allegations of Paragraphs 1 through 5 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

7. Property rights of the Plaintiff to the use of lands and otherwise are created by State Law and no such rights are created by the First and Fourteenth Amendments to the U.S. Constitution.

8. Plaintiff has no property interest in or right to exclusively use property owned by the City of Lakewood.

FIFTH DEFENSE

9. The allegations of Paragraphs 1 through 8 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

10. The Fourteenth Amendment to the U.S. Constitution, the Charter of the City of Lakewood, the Ohio Con-

stitution and the laws of the State of Ohio require that the City of Lakewood hold its property in a fiduciary capacity for the benefit of all citizens and taxpayers of the City and forbid allowing property so held to be exclusively used by any person, firm or corporation for private purposes, thereby denying equal protection to other citizens, unless such City property is not at the time needed for municipal purposes and the City receives fair and just compensation therefor.

SIXTH DEFENSE

11. The allegations of Paragraphs 1 through 10 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

12. Plaintiff's commercial use of property is subject to reasonable zoning ordinances, the same as bookstores, theaters, places of public assembly and other commercial uses, whether of the "First Amendment" classification or otherwise, and the Fourteenth Amendment of the U.S. Constitution mandates equal protection for all such uses.

SEVENTH DEFENSE

13. The allegations of Paragraphs 1 through 12 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

14. The Plaintiffs desired exclusive use of property owned and held by the City of Lakewood for public use is authorized by and may be applied for by the terms of the aforesaid Ordinance Nos. 108-83 and 109-83 as amended by Ordinance No. 2-84, decisions under such ordinance provisions are subject to judicial review by administrative

appeals to the courts of the State of Ohio pursuant to the terms of said Ordinances and Ohio Revised Code Chapter 2506 and by suits pursuant to Ohio Revised Code Chapter 2721 which provide state remedies for any wrong that may be claimed by Plaintiff.

15. The provision of such remedies provides due process to Plaintiff who is thereby barred from bringing the within Complaint. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Vicory v. Walton*, (6th Cir. 1983), Case No. 82-3823 (copy attached).

EIGHTH DEFENSE

16. The allegations of Paragraphs 1 through 15 of this Answer to the Amended Complaint are incorporated herein by reference, the same as though fully rewritten at length.

17. Plaintiff has failed to initiate and exhaust its administrative remedies which provide a plain and adequate remedy at law.

WHEREFORE, the Defendant, City of Lakewood, herein answering denies that the Plaintiff is entitled to any of the relief requested in the Amended Complaint and respectfully requests that the Amended Complaint herein be dismissed and that the Defendant, City of Lakewood, be given judgment for its costs, including reasonable attorney fees.

HENRY B. FISCHER
WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
Telephone (216) 781-1212
*Special Counsel for
The City of Lakewood*

No. 82-3828

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed November 30, 1983)

JOHN W. VICORY,
Plaintiff-Appellee,
v.

ROBERT R. WALTON, Sheriff of Butler County; and
JOHN F. HOLCOMB, Butler County Prosecutor,
Defendants-Appellants.

ON APPEAL from the United States District Court
for the Southern District of Ohio.

Before: MERRITT and KENNEDY, *Circuit Judges*; BERTELSMAN,* *District Judge.*

MERRITT, *Circuit Judge*, delivered the opinion of the Court in which KENNEDY, *Circuit Judge* concurs. BERTELSMAN, *District Judge*, (p. 9-11) filed a separate concurring opinion.

MERRITT, *Circuit Judge*. The primary question before us in this damage suit under 42 U.S.C. § 1983 (1976) for deprivation of property under color of state law without due process, is whether plaintiff must plead and prove the absence of adequate state damage remedies as an element of the constitutional tort. We conclude under the authority of *Parratt v. Taylor*, 451 U.S. 527 (1981), that in section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of plead-

*The Honorable William O. Bertelsman, Judge of the United States District Court for the Eastern District of Kentucky, sitting by designation.

ing and proving the inadequacy of state processes, including state damage remedies to redress the claimed wrong. The plaintiff in this case has failed to carry this burden. The judgment of the court below awarding damages to plaintiff is therefore reversed.

I.

Defendants Robert R. Walton and John F. Holcomb, the sheriff and prosecutor of Butler County, Ohio, appeal an order of the District Court granting a summary judgment against them in a section 1983 action for damages resulting from an alleged violation of civil rights guaranteed by the fourth, fifth and fourteenth amendments to the Constitution.

Plaintiff John W. Vicory owns a mobile home trailer in Overpeck, Ohio. On October 1, 1979, three persons were shot in this trailer which had been rented from Vicory by one of the murder victims.

At the direction of prosecuting attorney Holcomb, and with the consent of plaintiff, Sheriff Walton seized the trailer on October 2, 1979, for the purpose of investigating the triple homicide. The sheriff and prosecutor conducted an investigation at the trailer, which the coroner, Garrett J. Boone, had ordered sealed in order to preserve the scene for evidentiary purposes in case the trial judge, in his discretion, should order a view of it in the criminal trial.

After extended criminal proceedings against Richard E. Saylor, who entered pleas of not guilty and not guilty by reason of insanity to three counts of murder, the case was concluded on March 10, 1980, when the accused entered pleas of guilty to all three counts of the indictment. Two weeks later on March 24, 1980, Prosecutor Holcomb directed Sheriff Walton to return the trailer to Vicory's possession.

On October 16, 1980, plaintiff Vicory commenced this section 1983 suit against Sheriff Walton, alleging that he had been deprived of his property, the trailer, under color of state law, without just compensation.¹ On May 25, 1982, plaintiff amended his complaint to add Prosecutor Holcomb as a defendant.

On October 27, 1982, the District Judge issued an order granting plaintiff's motion for summary judgment and awarding him a judgment for \$850, the stipulated lost rental value of the trailer, plus reasonable attorneys' fees. The District Court held that the prosecutor was not entitled to absolute immunity, but only to a good faith immunity which on the facts of this case could not be invoked. Further, the court held that the retention of plaintiff's trailer without compensation amounted to a violation of due process under the fifth amendment.²

II.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court held that the negligent deprivation of a prisoner's property does not violate due process if adequate state remedies are available to redress the wrong. *Parratt* held that in order to state a claim for relief in federal court under section 1983, a plaintiff must show that available

1. Although plaintiff's counsel stated before this Court in oral argument that plaintiff had made demand on defendants for return of the trailer soon after it was seized, we find no evidence in the record of a demand or any other formal effort made under state law to regain the property.

2. The District Court made no direct reference to the sheriff's liability or immunity, perhaps because the sheriff did not raise the immunity issue as an affirmative defense. It must be presumed, however, that the District Judge intended the sheriff and the prosecutor to be jointly liable. Because we find that plaintiff has failed to show that he was denied the procedural due process § 1983 protects, it is unnecessary to reach the issue of the defendants' immunities.

state procedures were not adequate to compensate him for the deprivation of his property.

For the purposes of due process, retention of plaintiff Vicory's trailer in this case is analogous to the retention of the prisoner's hobby materials in *Parratt*. In both cases, a law enforcement official under color of state law has rightfully acquired, but perhaps wrongfully retained, the property of a citizen; and in both cases, state law provides immediate corrective process in its courts. In *Parratt*, Nebraska law provided the prisoner with a means to redress the loss of the hobby materials. See Neb. Rev. Stat. § 81-8.209 (1976). In this case, plaintiff can resort to an action in an Ohio court for forcible entry and detainer. See Ohio Rev. Code Ann. §§ 1923.01-.14 (Baldwin 1977). Moreover, the plaintiff is entitled to a jury trial under this statute. See *id.* § 1923.10. See also *Cuyahoga Metropolitan Housing Authority v. Jackson*, 67 Ohio St. 2d 129, 423 N.E.2d 177 (1981) (purpose of forcible entry and detainer statute is to provide summary, extraordinary and speedy method for recovery of possession of property). Although these state remedies may not provide the prisoner in *Parratt* or the plaintiff here with all the relief which might have been available if they could have proceeded under section 1983, the remedies could have fully compensated them for the property loss sustained, and are therefore sufficient to satisfy the requirements of due process.

There is a further significant similarity between this case and *Parratt*. The *Parratt* Court states that there is an important difference between a challenge to an established state procedure as lacking in due process—see, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating Florida garnishment procedure requiring a hearing only after the repossession)—and a property damage claim arising out of the alleged misconduct of state officers. In the latter case, as

here, "the state action is not necessarily complete," because state law provides a means for the plaintiff to be made whole for the loss of property. See *Parratt*, 451 U.S. at 542 (quoting with approval now-Justice Stevens' analysis in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), modified *en banc*, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978)); cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (distinguishing *Parratt*, the Court held that availability of post-termination tort action does not supply due process when "[i]t is the state system itself that destroys a complainant's property interest" with an established state procedure).

Allowing the plaintiff in this case to invoke section 1983 in the absence of a showing that state remedies are deficient would "make of the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt*, 451 U.S. at 577 (quoting *Paul v. Davis*, 424 U.S. 693 (1976)). It is difficult indeed to perceive any logical stopping place to a line of reasoning that would almost necessarily result in turning every alleged property deprivation resulting from a criminal investigation or prosecution in which the property of citizens is retained by the state for evidentiary purposes into a section 1983 action.³

3. The recent case of *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), is not to the contrary. In that case, the plaintiff alleged that she had been deprived of employment opportunities at Florida International University solely on the basis of race and sex, in violation of § 1983. The Supreme Court held that exhaustion of state administrative remedies is not a prerequisite to an action under 42 U.S.C. § 1983. *Patsy* does not, however, stand for the general proposition that a person seeking to state a claim under § 1983 for a deprivation of property without procedural due process need not plead and prove that post-deprivation procedures and remedies available under state law were deficient. *Patsy* was concerned with the issue of exhaustion, not with what is necessary to state a procedural due process claim under § 1983.

Plaintiff attempts to distinguish *Parratt* on the basis of intent. He argues that the conduct in refusing to return the property was intentional, rather than negligent, as in *Parratt*. Courts of Appeal are divided on whether the Supreme Court will extend the *Parratt* requirement of a showing of inadequate state remedies to cases involving the deprivation of liberty interests arising under the first and fourth through the eighth amendments or to intentional property deprivations. See, e.g., *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981) (holding that under *Parratt*, plaintiff must show that post-deprivation tort remedies available under Arizona law were deficient in order to state section 1983 claim for intentional assault and battery), *aff'd on other grounds sub nom. Kush v. Rutledge*, 103 S. Ct. 1483 (1983); *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983) (*Parratt* applies to intentional deprivations of property but not to substantive violation of privacy rights), *cert. granted*, 51 U.S.L.W. 3919 (U.S. June 27, 1983) (No. 82-1630); *Vail v. Board of Education of Paris Union*, 706 F.2d 1435 (7th Cir. 1983) (section 1983 extends to protect property interest of employee with implied contract of employment, and since Supreme Court has refused to expand *Parratt* beyond "a tortious loss of property or result of a random and unauthorized act by a state employee," *Parratt* rationale does not require employee to allege inadequacy of state law remedies), *cert. granted*, 52 U.S.L.W. 3262 (U.S. Oct. 3, 1983) (No. 83-87); Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L. Q. 545 (1982). See also *Ingraham v. Wright*, 430 U.S. 651 (1977) (no violation of procedural due process in school paddling case when plaintiff makes no showing that state remedies are inadequate).

As we read *Parratt*, the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct or is based on strict liability. Nor does it matter whether the writ at common law would be in detinue (action for wrongful detention of a chattel by a bailor), trespass *de bonis asportatis* (action for carrying away Plaintiff's chattels), trespass on the case (roughly speaking, an action for negligence) or a motion in a criminal case for return of property held as evidence. The reasoning of *Parratt* appears to extend at least to all section 1983 cases claiming a procedural due process injury to a property interest without regard to whether at common law a plaintiff would have sued in tort or contract and would have based his action on intent, negligence or strict liability.

Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in state court. So long as a state's damage remedies are not shown to be inadequate in theory or practice—that is, so long as there is no systemic problem with the state's corrective process—we see no purpose to be served by further complicating⁴ section 1983 liability for damages in property cases by distinctions grounded in different types of intent, negligence and strict liability. After all, we are interpreting a general constitutional provision which forbids state

4. Section 1983 damage suits take up a large part of the time of the federal courts and have given birth to a confusing maze of complex rules since *Monroe v. Pape*, 365 U.S. 167 (1961), expanded liability to unauthorized acts of state officials twenty years ago. See Whiteman, *Constitutional Torts*, 79 MICH. L. REV. 5, 25 (1980) (noting that "every expansion of constitutional rights [through section 1983] will increase the case load of already overburdened federal courts," which "dilutes the ability of federal courts to defend our most significant rights" and "displaces state lawmaking authority by diverting decisionmaking to the federal courts").

deprivations of "property without due process of law," not the Internal Revenue or some other statutory code requiring fine property law distinctions.

Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong. In the instant case the plaintiff has neither alleged nor shown any significant deficiency in the state's remedies.

Accordingly, the judgment of the District Court is reversed.

BERTELSMAN, *District Judge*, concurring. Reluctantly, I find myself unable to endorse the majority opinion, both because I feel that the doctrine of prosecutorial immunity is a sufficient and more narrow basis on which to dispose of this case and because I respectfully disagree with the majority's conclusion that the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), is applicable to the facts herein. Also, I find myself in disagreement with the majority's analysis of *Parratt*.

The defendant prosecutor was clearly absolutely immune under the doctrine of *Imbler v. Pachtman*, 424 U.S. 409 (1976), since all of his acts were well within the scope of his duties in prosecuting a criminal case. The defendant sheriff, having performed a ministerial function as directed

by the prosecutor, shares in that immunity. See *Timson v. Wright*, 532 F.2d 552, 553 (6th Cir. 1976) and cases cited therein; *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973).

The fact that the sheriff failed to plead the affirmative defense of immunity is not fatal, since in a situation involving joint defenses one defendant can take advantage of the defenses asserted by his co-defendant. See *Willis v. Fournier*, 418 F.Supp. 265, 267 (M.D. Ga.), *aff'd*, 537 F.2d 1142 (5th Cir. 1976); *Capitol City Manor, Inc. v. Culberson*, 613 S.W.2d 835, 837 (Ark. App. 1981); *Jackson v. District of Columbia*, 412 A.2d 948, 951 (D.C. 1980); *Haddad v. Louisville Gas & Electric Company*, 449 S.W. 2d 916, 919-920 (Ky. 1970); *Kooper v. King*, 15 Cal. Rptr. 848, 852 (Cal. App. 1961); 78 A.L.R. 938, 939.

Therefore, I would reverse with directions to enter judgment for both defendants on the basis of immunity alone.

I am constrained to conclude that *Parratt, supra*, is not applicable to the situation here presented. First of all, this case does not involve merely a denial of procedural due process, as stated by the majority, but also a denial of just compensation for the taking of private property for public use. There is abundant authority that such a cause of action is cognizable under § 1983. *Lake County Estates v. Tahoe Planning Agency*, 440 U.S. 391 (1979); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978); *Gordon v. Warren*, 579 F.2d 386 (6th Cir. 1978);

Secondly, the Supreme Court of the United States has expressly limited the scope of *Parratt* to cases involving a property loss resulting from a "random and unauthorized act by a state employee . . . not a result of some established

state procedure.' 451 U.S. at 541." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (quoting from *Parratt*). The Supreme Court held in *Monroe v. Pape*, 365 U.S. 167 (1980) that the existence of an adequate state remedy was not a bar to the pursuit of a § 1983 action. *Parratt* narrowed this somewhat, but not to the extent held by the majority opinion herein. I agree with the view of the Seventh Circuit that, in the light of *Logan*, *Parratt* cannot be extended to cases involving a loss of a property right as a result of intentional state action. *Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1440-1441 (7th Cir. 1983).

As I stated at the outset, it is with some reluctance that I find myself at odds with the majority concerning its interpretation of *Parratt*. I am in great sympathy with the desire of the majority to find some interpretation of § 1983 that will limit frivolous and *de minimis* actions brought under this statute, which in my opinion is employed in many situations never foreseen or intended by its framers. The statute was primarily intended to provide redress to victims of racial animosity, where state remedies were inadequate either *de jure* or *de facto*. See *Monroe v. Pape*, *supra*. I do not believe that the statute was ever intended in the absence of invidious discrimination as a remedy for disgruntled teachers or other public employees or for losses of property through state action.

Where I have felt myself at liberty to do so within the limits imposed by *stare decisis*, I have tried to confine the * * *

* * * * *

No. C83-63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

FINAL PRETRIAL ORDER*

This action came before the Court at a final pretrial conference held on the 9th day of April, 1984, at 9:30 a.m., pursuant to Rule 16, Federal Rules of Civil Procedure.

* * * * *

X. FACTS

A. Comprehensive Stipulation or Statement of All Uncontroverted and Uncontested Facts:

1. JT-1 through JT-3 are true copies of Ordinances 108-83, 109-83 and 2-84 amending Section 901.18 of the Codified Ordinances and enacting and amending Section 901.181 of the Codified Ordinances, respectively. Section 901.181 as it currently reads in its entirety is set forth in JT-4. These ordinances relate to the placement of newspaper vending machines on property owned by the City of Lakewood.

2. Sections 901.18 and 901.181 require a permit and payment of a rental fee before newspaper vending machines can be placed on property owned by the City of Lakewood.

3. The daily circulation of The Plain Dealer is approximately 493,000 copies. In the city and suburban

*Made part of Record orally during trial.

area The Plain Dealer distributes 77% of the copies circulated daily by means of home delivery and distributes the remaining 23% by means of "single copy sales". Distribution by newspaper vending machines accounts for 25% of these "single copy sales". In the city and suburban area Plaintiff currently has 976 newspaper vending machines from which it sells in excess of 20 newspapers per day from each machine.

4. Plaintiff has proposed placing newspaper vending machines at sixteen locations on the right-of-way in the City of Lakewood. Of these sixteen locations, twelve have bus shelters. Eight of the locations where plaintiff currently wishes to place its newspaper vending machines are on Clifton Boulevard. Clifton Boulevard is a main thoroughfare in the City of Lakewood.

5. Bus line numbers 55, 31 and 46F travel on Clifton Boulevard. The number of buses that travel on lines 55, 31 and 46F per day, during the week is 304, 8 and 10 respectively. On Saturdays, the 55 line has 87 buses that travel on Clifton Boulevard on the 55 line. No buses travel on Clifton Boulevard for the 31 and 46F lines on weekends. The above listed numbers represent the total of buses driving east and west on Clifton Boulevard.

6. PT-28 to PT-31 are true copies of RTA bus schedules for Clifton Boulevard.

7. The following is the average number of weekday passengers who board a #55 Clifton eastbound bus in the City of Lakewood.

Number of Passengers	Location
50	West Clifton
40	Webb
20	Granger

Number of Passengers	Location
30	Edwards
50	Westlake
50	Summit
50	French
175	Warren
90	Belle
35	Gladys
30	Manor Park
80	Bunts Rd.
30	Elbur
20	Jackson - 13439
	Clifton
70	Nicholson
40	Thoreau
100	Cove
75	Fry

8. Clifton Boulevard for the most part is in an area zoned for residential use and under Section 901.181 as currently enacted, newspaper vending machines on Clifton Boulevard in the residential districts are prohibited.

9. Each of the locations on Clifton Boulevard where plaintiff currently proposes placing newspaper vending machines already has a bus shelter and a trash container.

10. The dimensional requirements (distance from curb, width of sidewalk, etc.) in Section 901.181(b)(1)-(b)(5) of the Codified Ordinances of City of Lakewood can be met at each of the locations currently proposed by plaintiff, including the locations on Clifton Boulevard.

11. Plaintiff has requested attorneys fees in this action.

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Nos. C83-63, C84-1071

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

TRANSCRIPT OF PROCEEDINGS

(Trial Commenced April 11, 1984)

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE GEORGE WHITE, JUDGE OF SAID
COURT, COMMENCING WEDNESDAY, APRIL 11, 1984;
9:15 O'CLOCK A.M.

[2] APPEARANCES:

For the Plaintiff The Plain Dealer:

MS. KAREN NEWBORN, ESQ.

For the Plaintiff The New York Times:

MR. DAVID NELSON, ESQ.

For the Defendant City of Lakewood:

MR. HENRY B. FISHER, [sic] ESQ.

MR. ROBER [sic] TIBBETS, ESQ.

Official Court Reporter:

ROY THOMPSON, JR.

[3] WEDNESDAY, APRIL 11, 1984; 9:15 A.M.

The Court: Good morning. Be seated, please.

This is Case No. C83-63, The Plain Dealer Publishers
versus the City of Lakewood.

Also the Court has permitted the case No. C84-1071,
The New York Times Company versus the City of Lake-
wood, to be parties here as far as the preliminary injunc-
tion is concerned in line with our last order we had.

Are we ready to proceed?

Ms. Newborn: Yes, your Honor.

The Court: You may proceed, Ms. Newborn.

Mr. Fisher: I would like to make two preliminary
motions; one for a separation of the witnesses, and the
second one is as to the inclusion of the New York Times.

This has come upon us very suddenly, and in the
flurry there is one thing I didn't point out earlier that
has come to me, and that is that the plaintiff will have
the right to cross-examine our witnesses, and the City
of Lakewood would not have an opportunity to cross-
examine the affidavits of The New York Times, so we
request that they be [4] stricken, or that they not be
allowed to cross-examine our witnesses.

The Court: Do you wish to be heard?

Mr. Nelson: Your Honor, I confess this takes me
totally by surprise. There has been no request that these
witnesses be produced for examination.

The facts set forth in the affidavits of our affiants
are, as far as I know, not controverted.

News boxes were placed on Clifton Boulevard, and
they were removed, and I don't think there is a dispute
as to the nature of the primary traffic artery that flows
through Lakewood along Clifton Boulevard, and I am at
a loss to understand on what basis the affidavits could
be stricken or that the Times could be denied the op-
portunity to cross-examine witnesses whose testimony will,
as I understand it, be offered by the City in an effort to
sustain the heavy burden which rests on the City to
show that the ordinance meets a compelling need in the
least restrictive manner, and can be upheld on that basis.

Mr. Fisher: Your Honor, I understand what Mr. Nel-
son is saying, and I can understand his comments under
ordinary circumstances, but I think the courts are aware of

the flurry of documents and [5] meetings that we had in the other case, and I honestly have not been able to read everything Mr. Nelson has given me.

One factor I am keenly aware of is the factor of irreparable injury.

This is just a blanket statement. We have no idea what the irreparable injury is.

My opinion is that where you didn't have a market, you haven't been cut off from a market that was non-existent to begin with, and I think we should have a right to cross-examine on that point because I don't believe there is any irreparable injury.

The Court: Well, proceed. It may be that as opposed to a preliminary injunction, we will treat it as a motion for a temporary restraining order. In any event, you may proceed.

As to the one motion that was filed, we said in chambers we might put on the record there was a motion for a view of the premises, and the Court said it would deny the motion unless the Court feels it needs to see the premises as a result of what goes on in the hearing.

So I believe there was a change made in the pretrial order. Was that change agreed to by counsel [6] on both sides?

Mr. Fischer: Not 100 percent, but I don't think it is a reason to delay the case.

The Court: What is it?

Mr. Fisher: The change that was made does not state a ground of objections, and the pretrial order requires if you object to the exhibits, you are supposed to state your grounds.

Previously I was led to believe there are some inaccuracies in the one particular, some particular exhibits that we had, and that was stated initially.

However, now that this has been scratched out, and I really don't know what the objections are other than if there are inaccuracies, and I think in one case it was mentioned that an article in the Planner's Journal about newspaper boxes—I believe there was going to be an objection on hearsay.

The Court: What is scratched out is on page 4 of the pretrial order. Plaintiff and defendant have stipulated the authenticity of each other's exhibits with the exception, plaintiff reserves all objections to defendant's exhibits AA, BB, and DD.

Ms. Newborn: And the first page of GG. We don't object to the authenticity.

[7] The Court: The plaintiff and defendant reserve the right to object to all exhibits on the grounds of relevance.

Mr. Fisher: This was originally agreed, all reserving the right to object on the grounds of relevance, but she reserved to all objections, and the pretrial says you have to state your objections, so we don't know what she is talking about.

The Court: At the time of those exhibits, we will get into it. Let's proceed.

Ms. Newborn: Your Honor, The Plain Dealer Publishing Company is here today seeking vindication of its most fundamental and previous right, the right to use the streets to communicate ideas and the news.

In this action plaintiff seeks declaratory and injunctive relief pursuant to Section 42 U.S.C., Section 1983, and the discretion of the Court—excuse me, the jurisdiction of the Court has not been disputed.

Plaintiff seeks the declaration that Section 901.18 and 901.181 to the codified ordinances of the City of Lakewood seeks a declaration they are unconstitutional because they

interfere with the plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution, [8] specifically Section 901.18 and 901.181, and they interfere with plaintiff's rights to place newspaper vending machines in a public right of way in the City of Lakewood.

On August 18, 1983, this Court entered a summary judgment for the plaintiff, declaring and adjudging that Section 901.18 as then enacted, was unconstitutional and void insofar as it was a blanket prohibition preventing The Plain Dealer from placing newspaper vending machines on public property.

The Court made clear The Plain Dealer has a fundamental right to place newspaper vending machines along the public streets.

The Court held up the matter of the permanent injunction for 60 days to give the City of Lakewood an opportunity to enact reasonable legislation.

Then the City amended the 901.18 and enacted a new section, 901.181, which is specifically related to newspaper vending machines.

After that the City once again enacted another ordinance that amended 901.181.

Despite these continuing amendment sections, 901.181 and 901.18 remain constitutionally defective.

Those ordinances are unconstitutional on three different grounds, each of which ground standing [9] on its own would be enough to compel the Court to render a decision that the ordinances are unconstitutional and void in their entirety.

The first ground of unconstitutionality is that these ordinances constitute a prior restraint of plaintiff's pursuance of their First Amendment rights.

The ordinances contain a permitting scheme that requires the owner of a newspaper vending machine to have

a permit from the City before it can place the machine on the property along the street.

Additionally, it requires that the design be approved by the Architectural Board of Review, and they require the payment of a permit fee before the newspaper vending machine can be placed on street property.

The second ground is that the ordinance leaves the pursuance of the plaintiff's fundamental First Amendment rights to the discretion, whim and caprice of the Mayor and the Architectural Board of Review.

The second paragraph of the section 901.18 provides that the Mayor shall deny the permit or shall grant it on the following conditions.

It does not indicate any conditions under [10] which the Mayor shall deny; in other words, he can deny for any reason whatsoever, and if he grants it, he is limited by the conditions of the ordinance.

Additionally one of the conditions of the granting of the permit is that the granting of the license or permit—that the permit shall be granted on such other terms and conditions as deemed necessary by the Mayor.

With this language, there can be no question that these ordinances left the plaintiff's exercise of First Amendment rights to the discretion of the Mayor.

In addition there are provisions in 901.18 that provide that the Architectural Board of Review must approve the design of the newspaper's vending machine before they can be placed on the property along the streets.

Again, there is no standards for the exercise of this discretion.

The third ground on which the ordinance is unconstitutional is that they do not constitute the narrowest possible means of achieving a substantially State interest.

Since distribution of the newspapers through newspaper vending devices along the street are [11] protected

activity, the applicable standard is that it can only be a regulation that meets a substantial State need, and drawn as fairly as possible.

We submit that a review of the ordinances show this is contrary—that the ordinances are drawn as broadly and overintrusive as possible.

Because of the nature of the issues in this case, plaintiff will present very minimal evidence. We believe the issues are primarily legal, and questions of whether the ordinances are unconstitutional requires only a legal interpretation of the ordinance.

The question of whether the ordinance creates unfettered discretion of the Mayor and the Architectural Board of Review again requires only interpretation of the language of the ordinance, which we believe is clear.

On the third issue, and that is the issue of whether the ordinances are justified by a substantial Government interest and the least restrictive means of imposing a needed regulation, the defendant does have the burden of presenting evidence.

He must present evidence and carry the burden to show the ordinances are justified by a substantial Government interest and are the least restrictive means of imposing a needed regulation of a [12] constitutionally protected right.

For a background the plaintiff will present one witness, Robert Thrasher. He is the circulation manager of The Plain Dealer, and he will testify about The Plain Dealer's distribution of newspapers and the role of the newspaper vending machines in that distribution.

He will testify that The Plain Dealer has been distributing newspapers through vending machines for ten years, and the machines are an important means of the distribution of the news.

Moreover, in the ten years that the plaintiff has been using machines, there have been no significant safety problems.

Lakewood's ordinance contains a blanket prohibition against the newspaper vending machine distribution along a residential street.

The evidence will show that Clifton Boulevard is zoned as a residential, a main thoroughfare, and there are many bus stops and telephone booths; and moreover, Clifton Boulevard is a route, a State route, and displays numerous traffic signs. This is obviously a street for newspapers to locate vending machines on.

The evidence will show that the prohibition [13] against newspaper vending machines in all residential streets, including Clifton Boulevard, is unreasonable, unnecessary and overly intrusive.

As I indicated before, the defendant has the burden of justifying its regulations governing newspaper vending machines.

We submit the defendant's rationale to the Court will be solely vague generalities without any specific evidence, and the City will be completely unable to meet the standard necessary to justify impinging on plaintiff's fundamental First Amendment and Fourteenth Amendment rights.

In fact, we submit the defendants—excuse me—we submit the plaintiff's evidence—I was right the first time—in fact, we submit the defendant's evidence will show that the defendant continues to deny plaintiff's right to have newspaper vending machines on property along their street.

We will ask the Court at the close of the evidence to declare Section 901.18 and 901.181 are unconstitutional and void in their entirety, and the City of Lakewood be enjoined from enforcing those sections.

The Court: Mr. Fisher.

[14] Mr. Fisher: If the Court please, and counsel for the plaintiff.

The Court is no doubt familiar with the San Diego—Metromedia case. In that case there is a statement by the U.S. Supreme Court that the standard to be applied to a case depends upon the medium that you are dealing with.

Obviously, you cannot use the same standards to control T.V., radio, leaflets, picketing, and signage.

The Court will also find that it is rather a fundamental principle of law that we are a city where choosing to provide or not provide a service—that they have that privilege, and once it is offered, the privilege must be given to all the services, or the privilege must be administered to all equally.

In this case The Plain Dealer is seeking to apply the leaflet, picketing, and distribution of pamphlets type of law to a situation that involves actually signs, erection of signs, and erection of objects in the public right of way.

And it is submitted that the law should not carry over, notwithstanding what other District Courts have said.

[15] The facts will show, although the ordinance was adopted, and I would concede that the residential districts were not permitted on zoning grounds, that people in residential, residentially zoned districts can't have these machines on their porches or in a book store or in a house.

It is inconceivable that The Plain Dealer, who does not pay a dime for what it is doing, should be able to put something on somebody's tree lawn that they couldn't even put in their own front yard.

As far as the use of those devices on Madison, the evidence will show that the ordinance was drawn so that physically the devices can be placed wherever they select.

Specifically on Madison and Detroit, the City went out of their way to make this possible; that they could place them there.

The evidence also will show the plaintiff chose not to apply for placement of them, and had they so applied, they would have these boxes installed on Madison and Detroit at this very time.

We are dealing here, not with the police power of regulating how somebody else conducts their property; but we are dealing with the control of a property by the City, by the Government.

[16] Again, the principle involved is that the City does not have to get into the field. There was one case where the City closed down a swimming pool, and upon a lawsuit the Court held that if they had it opened, they had to have equal protection and use it, but if it is closed, they do not have to be in the field.

The evidence will also show that in the City of Lakewood there are numerous sites where The Plain Dealer has been sold, or could be, including—I think it is about in the neighborhood of 30 places where newspaper devices, boxes are already located, or the stores that are open all night.

You can buy the paper in the City of Lakewood 24 hours a day.

The problem of marketing The Plain Dealer or The New York Times, or whatever paper, to put their paper at these places is not something that the City of Lakewood has no control over. We presume that their circulation managers would have this problem, and there are alternate means of communication if desired.

The evidence also will show in the market of the City of Lakewood, Madison and Detroit are accessible and within walking distance to any persons residing in Lake-

wood if they choose to take a walk or [17] buy a paper, whatever they want to do.

The evidence will show that the bus shelters and the telephones installed along the right of way of the City of Lakewood are put there for the purposes of health and safety; and that the boxes that The Plain Dealer seeks to install are strictly for the commercial sale of their property for name identification and advertisements, and they do not serve any purpose of public health or safety.

The evidence will also show that the placement of anything in the right of way is undesirable because there are numerous accidents that occur in the area outside of the streets, including the sidewalks and what is known as tree lawns, and accidents do occur there, and the evidence will show according to our witnesses that the least amount of things that you place there the better, and the least chance, the less odds there is going to be an accident.

People do walk into these devices and do walk into mailboxes.

It is best to have as little as possible in these areas.

In the sum total I think the Court will find the City of Lakewood has exercised their responsibility of property ownership, and I would [18] point out that the evidence—I think it may be stipulated, but wasn't clear, that the City of Lakewood does own the tree lawn and sidewalks and the streets in the right of way, and they are exercising their property rights on them.

The evidence will also show that wherever the newspaper boxes are situated in the City of Lakewood on private property, that The Plain Dealer, for some reason, apparently economic, refuses to pay any fee.

This could be another reason why they cannot get them on private property, because they refuse to pay a fee for the placement of the boxes.

The evidence will show that The Plain Dealer refuses to pay anybody anything for the placement of these devices on their property.

In sum total the evidence will show that these ordinances are reasonable and therefore constitutional and no constitutional rights of the plaintiff have been denied nor have they been deprived of selling newspapers in Lakewood for years, and I presume they will be selling them for years after this case is concluded.

The Court: Mr. Nelson.

Mr. Nelson: Your Honor, in accordance [19] with the agreement reached last week, the case in chief, as it were, for The New York Times will consist chiefly of what The Plain Dealer already has before the Court.

In view of that fact, and in view of the fact that their analysis of the law has already been presented to the Court, and the brief that we filed in support of the application for a preliminary injunction, and in view of the conclusions I derived from the opening statement of counsel for the City of Lakewood that this is not a case in which there are major questions of fact in dispute, it is clearly a case in which the Court's task will be to decide what constitutional conclusions should be drawn from evidence that is essentially undisputed.

I would simply, I think, as my opening statement, submit the paper now and file an endorsement of the very fine presentation by counsel for The Plain Dealer already made.

Thank you, Your Honor.

Ms. Newborn: The plaintiff calls Robert Thrasher.

[20] ROBERT THRASHER, having been called as a witness on behalf of the plaintiff The Plain Dealer, the witness was examined and testified as follows:

DIRECT EXAMINATION

By Ms. Newborn:

Q. Would you state your name for the record, please.

A. Robert W. Thrasher.

Q. Spell your last name. A. T-h-r-a-s-h-e-r.

Q. By whom are you employed? A. The Plain Dealer Publishing Company.

Q. What is your position with The Plain Dealer Publishing Company? A. Director of Circulation.

Q. What are your duties and responsibilities as Director of Circulation? A. I administer the Circulation Department.

Q. How long have you been employed by The Plain Dealer Publishing Company? A. Approximately 27 years.

Q. How much of that time has been in the circulation portion? A. About five years now.

[21] Q. What other positions had you held in the Circulation Department? A. I was Circulation Manager to the administration for about three years, and I was Assistant Circulation Director for about a year.

Q. What were your duties and responsibilities in each of those positions? A. The first job as Assistant Circulation Director was learning the job. I was brought into the department because of the pending departure of the then current Circulation Director.

The Circulation Manager of Administration was a job that I controlled all sales of the paper and all service complaints and things of that sort.

Q. Did you have any duties with regard to the newspaper vending machines as Circulation Manager? A. Yes.

Q. How long have you held your current position of Circulation Director? A. Since September of 1983.

Q. What is the business of The Plain Dealer Publishing Company? A. We publish the newspaper.

Q. What newspaper? A. The Plain Dealer.

[22] Q. Where is The Plain Dealer distributed? A. As a newspaper of general circulation in the Greater Cleveland area and Ohio.

Q. Is it distributed outside of Ohio? A. Yes, it is.

Q. What is the average daily circulation of The Plain Dealer? A. Approximately 493,000.

Q. Will you turn in your exhibit book in front of you to Exhibit PT-21 or PD, and identify it. A. It is a newspaper publishing statistics for the six months period ending September 30, 1983.

Q. What is the information contained in PD-21? A. It is basic information as to circulation on various days of the week.

Q. Tell the Court what the circulation is? A. The morning circulation, Monday through Friday, 490,329. The morning on Saturday is 455,949, and Sunday it is 500,353.

Q. Is this the most recently published newspaper publisher's statement? A. It is.

Q. Does this document tell you what the distribution of The Plain Dealer is in Cuyahoga County? A. Yes.

[23] Q. What is that distribution? A. On the morning, Monday through Friday, 367,578; mornings on Saturday, 338,035; and on Sunday, 371,446.

Q. How does The Plain Dealer distribute its newspapers? A. Home dealers or single copy sales.

Q. When you say "single copy sales," what do you include? A. Store sales, vending machine sales, school sales, and mail sales.

Q. Would you now take a look in your exhibit binder to Plaintiff's Exhibit 20. Would you identify Plaintiff's Exhibit 20, please. A. The monthly comparison of circulation, and it has the month of September of 1983.

Q. On a monthly basis does the circulation of The Plain Dealer vary substantially from month to month? A. No.

Q. What information is contained on PT-20? A. It gives us by various categories the total monthly number of newspaper circulation, the average for the month of September, 1983, the average for the month of September, 1982, and the gain or loss between those two years, and the percentage of gain or loss between those two years.

[24] Q. What does it tell you in PT-20 as to what percentage of The Plain Dealer's distribution is by single copy sale? A. Yes.

Q. What percentage is that? A. In the city and suburban area, approximately 23 percent. In the total area of distribution, approximately 28-1/2.

Q. When you say "city and suburban," what area are you referring to? A. Cuyahoga County and parts of each of the surrounding contiguous counties.

Q. And the total then would be all the distribution? A. The complete distribution.

Q. Would it be correct to refer to the city and suburban areas as the Greater Cleveland area? A. Yes.

Q. Now, if you would, please, Mr. Thrasher, take a look at Exhibit 19 in your exhibit binder. Can you identify that Plaintiff's Exhibit 19? A. It is a single—it is a vending machine report, sales report.

Q. How long has The Plain Dealer used newspaper vending machines in the distribution of its newspapers? [25] A. About 10 years.

Q. To your knowledge are there any records that these machines have caused any serious harm or safety problems? A. No.

Q. In the last four years since you have been a circulation manager, have there been complaints of serious harm or safety problems? A. No.

Q. Looking at Plaintiff's Exhibit 19, can you tell from this exhibit how many newspapers, on a daily average, are distributed through each newspaper vending machine? A. Through each newspaper vending machine, yes.

Q. What is the number? A. It varies from 20 to about 26 or 27 per machine per day.

Q. Can you tell from Plaintiff's Exhibit 19 what percentage of The Plain Dealer single copy sales are by newspaper vending machines? A. Not directly.

Q. Can you tell by this one and another one? A. Yes.

Q. What exhibits do you look at? A. This exhibit and PT-20.

[26] Q. Looking at both of those exhibits, what is the percentage of single copy sales of the plaintiffs through newspaper vending machines? A. Approximately 25 percent.

Q. You indicated before that The Plain Dealer had been using newspaper vending machines for 10 years for distributing the newspapers. Why does The Plain Dealer use those vending machines? A. The Plain Dealer uses the vending machines to increase circulation and allow a customer at any hour of the day to obtain a newspaper, whether or not a store is open.

Many people don't want home delivery of the paper. They want to buy it mainly on certain days or certain sections, so we have a vending machine nearby for them to do that.

People who are commuters—quite often one spouse is at home and may want home delivered papers, and the other spouse may want to read it at work or on the bus.

Q. Where does The Plain Dealer usually place the newspaper vending machines? A. In areas of high pedestrian or high commuter traffic.

[27] Q. Why do they place them at these locations? A. These are locations where people are going by all the time. We find that people are more likely to buy the newspapers when it is close at hand than to walk two or three blocks to maybe a store that is open all night or something.

Q. Are there any particular kinds of people you are trying to attract by placing the vending machines at these locations? A. Particular kinds of people?

Q. Yes. A. Well, we are trying to attract people who want to buy the paper.

Q. Would they be bus commuters? A. Oh, yes; bus commuters or regular pedestrian people.

Q. Is the distribution of the machines an important part of the distribution process of The Plain Dealer? A. It is quite important.

Q. What types of newspaper vending machines does The Plain Dealer use? A. We use basically two different manufactured vending machines. The first is manufactured by Casper Wireworks in Shiner, Texas, and the TKY Vending Machines, and [28] the second one, which is similar, is manufactured by a Florida concern.

Q. Would you turn in your binder to Plaintiff's Exhibit 1. Can you identify the exhibit? A. Yes. That is some sort of sales pamphlet from TKY Vending Machines.

Q. Is this one of the two types The Plain Dealer generally uses? A. Yes.

Q. And the other type is similar? A. Very similar, yes.

Q. How many newspapers have to be distributed through the newspaper vending machine to justify placing such a vending machine in a particular location?

Mr. Fisher: Objection.

The Court: Overruled.

By Ms. Newborn:

Q. You may answer.

The Court: As far as your organization.

A. As far as our organization is concerned, five a day.

Q. How many newspaper vending machines does The Plain Dealer use altogether? A. Approximately 2,000.

Q. How many are in the city and suburban area? [29] A. Approximately 970.

Q. Where are the boxes located? A. Areas of high pedestrian or high commuting traffic.

Q. In the city's actual suburban areas in what suburbs does The Plain Dealer have newspapers in a vending machine? A. In almost every suburb.

Q. Which suburbs did The Plain Dealer have newspaper vending machines on public property? A. In almost all but Lakewood.

Q. In any of the cities does The Plain Dealer have newspaper vending machines on residential streets? A. Yes.

Q. Can you give examples? A. In Euclid we have this Lake Shore Boulevard, and East 276th and Cleveland Heights.

Mr. Fisher: Objection. It is irrelevant where they have them in some other city.

The Court: Sustained.

Ms. Newborn: May I address it?

There is a provision in the ordinance as we know prohibiting newspaper vending machines on all residential streets in the City of Lakewood.

I believe they have been trying to justify the prohibition by a reference to the zoning code, and [30] indicating in some manner the newspaper vending machines don't belong on residential streets just by the nature of the zoning code.

Mr. Thrasher is going to indicate The Plain Dealer does have them in such locations and in many other communities, and on residential streets. We have some pictures to show the Court, and I think the relevance of the issue is whether it is going to be a blanket prohibition on newspaper vending machines.

The Court: I still will sustain it.

By Ms. Newborn:

Q. Would you, Mr. Thrasher, turn to Plaintiff's Exhibit 40 in your binder. A. I am sorry?—40?

Q. Yes. A. I don't have 40—well, okay. Here it is.

Q. Can you identify that exhibit? A. Yes. That is a picture of several vending machines, one of which is The Plain Dealer. It is on Van Aken Boulevard and Kenmore in Shaker Heights.

Q. Is that a residential street? A. Yes.

Q. Would you turn to Plaintiff's Exhibit 41. Would you identify that exhibit, please? A. Yes. That is a picture of a vending machine again [31] at Van Aken and Avalon in Shaker.

Mr. Fisher: I object to these questions. Does it prove how it looks when it is in a residential area?

The Court: I assume that is what it proves. Overruled.

By Ms. Newborn:

Q. Was Plaintiff's Exhibit 41 taken on a residential street? A. Yes.

Q. Would you look at Plaintiff's Exhibit 42, please, and identify that photograph. A. This is a picture of a Plain Dealer vending machine at the corner of Almar and Warrensville Center Road, Shaker Heights.

Q. Is that in front of a residence? A. Yes.

Q. Turn to Plaintiff's Exhibit 43, please. Would you identify that photograph. A. That is a picture of vending machines one of which is a Plain Dealer vending machine at the corner of West 104th and Clifton, in the City of Cleveland.

Q. Is that in a residential area? A. Yes.

Q. And would you turn to Plaintiff's Exhibit 44, [32] please. Would you identify that photograph. A. Again that is a picture of vending machines, one of which is The Plain Dealer's at the corner of Clifton and West 112th in the City of Cleveland.

Q. Does The Plain Dealer have any newspaper vending machines on any property owned by the City of Lakewood? A. No.

Q. Why not? A. Well, it has been the history of not being allowed to put vending machines there, and there is an ordinance now, but we feel that it is prohibitive.

Q. Would you take a look now at Plaintiff's Exhibit 2 in your exhibit binder. Would you identify that, please. A. It is a list of vending machine locations that we have requested in the City of Lakewood.

The Court: You did what?

The Witness: That we have requested.

By Ms. Newborn:

Q. Now, would you turn to Plaintiff's Exhibit 3. Would you identify that photograph. A. It is a photograph of a Plain Dealer vending machine at a bus shelter at Clifton and Webb in Lakewood.

Q. Is there actually such a newspaper vending [33] machine at that location? A. No.

Q. How did it get in there? A. We had one of the men go out there and put it there and take a picture, so we could show how it looked.

Q. Is this one of the locations selected by The Plain Dealer? A. Yes.

Q. Turn to Plaintiff's Exhibit 4, please. Would you identify that photograph. A. That is at Clifton and Summit in the City of Lakewood, a vending machine at a bus shelter.

Q. Again, is this a location selected by The Plain Dealer as appearing on Exhibit 2? A. Yes.

Q. Would it be true of all of the photographs we are going to look at, that the newspaper vending machines were placed for purposes of photographs and removed immediately thereafter? A. Well—

Q. —the ones that conform to your list? A. Yes. If they conform to the list, yes.

Q. Turning now to Plaintiff's Exhibit 5, can you identify that photograph? [34] A. That is equipment in on Warren, a vending machine, a Plain Dealer vending machine at an RTA bus shelter.

Q. And again this is a site where The Plain Dealer would like to place such a machine? A. Yes.

Q. Turn now to Plaintiff's Exhibit 6 and identify that. A. That is a photograph of Clifton and Bunts in Lakewood, showing a Plain Dealer vending machine at an RTA bus shelter.

Q. And again that is a location where The Plain Dealer would like to place the newspaper vending machines? A. Yes.

Q. Turning to Plaintiff's Exhibit 7, would you identify that. A. That is a photograph showing a Plain Dealer

vending machine at Clifton and Nicholson in the City of Lakewood, one of those spots where we have requested boxes.

Q. Turning to Plaintiff's Exhibit 8, would you identify that photograph. A. It is a photograph of a Plain Dealer vending machine at an RTA shelter at Clifton and Fry in the [35] City of Lakewood.

Q. Turning to Plaintiff's Exhibit 9, would you identify that. A. A photograph of a Plain Dealer vending machine at an RTA shelter at Clifton and Thoreau in the City of Lakewood.

Q. Turn to Plaintiff's Exhibit 10 and identify that exhibit. A. It is a photograph of a Plain Dealer vending machine in an RTA shelter at Clifton and Bell in the City of Lakewood.

Q. And Exhibit 11? A. That is a photo of a Plain Dealer vending machine at an RTA stop at the corner of Detroit and Lincoln in the City of Lakewood.

Q. And Plaintiff's Exhibit 12? A. A photo of a Plain Dealer vending machine at the corner of Madison and Warren in the City of Lakewood.

Q. And Plaintiff's Exhibit 13? A. A photo of a Plain Dealer vending machine at an RTA shelter at the corner of Madison and Bunts in the City of Lakewood.

Q. Plaintiff's Exhibit 14? A. A picture of a Plain Dealer vending machine at an RTA stop at the corner of Madison and Lincoln in [36] the City of Lakewood.

Q. And Plaintiff's Exhibit 15? A. A picture of a Plain Dealer vending machine at the corner of Detroit and Cordova in the City of Lakewood.

Q. Plaintiff's Exhibit 16? A. A picture of a Plain Dealer vending machine at the corner of Detroit and Westwood in the City of Lakewood.

Q. Plaintiff's Exhibit 17? A. A photo of a Plain Dealer vending machine at the northwest corner of Detroit and Warren in the City of Lakewood.

Q. And Plaintiff's Exhibit 18? A. A photo of a Plain Dealer vending machine at the corner of Detroit and Warren, southwest corner, in the City of Lakewood.

Q. As I understand, the photographs that appear at Plaintiff's Exhibits 3 through 18 conform to each of the locations that appear on Plaintiff's Exhibit 2; is that right?

A. That is correct.

Q. And currently at each of these locations there is no newspaper vending machine; is that right? A. That is correct.

[37] Q. But these are locations where you would like to place them in the City of Lakewood at the present time?

A. That is correct.

Q. What type of newspaper vending machine does The Plain Dealer anticipate placing in the City of Lakewood? A. By "type" you mean the style?

Q. Yes. A. We would anticipate putting in a TKY vending machine.

Q. Is that shown in the pictures? A. Yes.

Q. Have you reviewed the current Lakewood ordinances regarding newspaper vending machines? A. I have.

Q. Have you reviewed the provisions regarding permits? A. Yes, I have.

Q. Would these provisions have any impact on the distribution of The Plain Dealer? A. Yes.

Q. Why? A. Well, the requirement of getting a permit would cause us delay in putting vending machines in, which causes a delay in the ability of people in Lakewood to purchase a newspaper at that machine.

[38] Q. Have you reviewed the provisions of the Architectural Board of Review in Lakewood? A. Yes.

Q. Would the provisions affect The Plain Dealer?

A. Yes, and again, there would be a delay. We couldn't sell newspapers, and it would be lost sales of papers that we never could recover; and secondly, there are no stipulations I believe in the ordinance—I don't know if "stipulations" is the right word—there is no general requirements of what type of vending machine or anything of that sort in the ordinance. It leaves the Architectural Review Board open. They may turn down types of machines to the extent that we couldn't put a machine up. There is no "guidelines" I believe is the proper term.

Q. Would a provision prohibiting a newspaper dispensing device within 250 feet of another newspaper dispensing device be any problem to The Plain Dealer? A. Yes.

Q. Why? A. We may want to go to a corner such as Warren and Detroit, and be on opposite corners, which would not be 250 feet apart from the same Plain Dealer vending machine.

[39] Q. Have you reviewed the provisions of 901.181 of the Lakewood ordinances that prevents placing vending machines in a residential district? A. Yes.

Q. Does this provision have any impact upon the distribution of The Plain Dealer? A. Yes, it does.

Q. Why? A. Clifton Boulevard, for instance, is a very high commuter and pedestrian area, and vending machines in that area would allow us further distribution of our product.

Q. Can you describe Clifton Boulevard more fully? A. It is an east-west highway, a state highway, I believe, and maybe even a federal route, and it is six lanes wide, basically residential, but with commercial on the eastern portion.

Q. Does it have bus shelters? A. Yes.

Q. Do you know how many? A. Approximately 12.

Q. Does it have traffic signals? A. Yes.

Q. How many? A. At least 12.

[40] Q. Does it have telephone booths? A. Yes.

Q. Would you turn now to Plaintiff's Exhibit 32 in the exhibit binder. Would you identify the photographs in Plaintiff's Exhibit 32? A. It is a photograph of a corner of Clifton Boulevard and Fry in the City of Lakewood.

Q. What does that show? A. It shows a stop sign, what appears to be an electrical or telephone pole, two mailboxes, and some sort of telephone company boxes, electrical boxes.

Q. Would you turn now to Plaintiff's Exhibit 33, and identify that exhibit. A. That is basically the same picture taken from across the street at Clifton and Fry in the City of Lakewood.

Q. Does it show any items on the right of way? A. It shows a rubbish container and an RTA bus stop shelter.

Q. Would you turn now to Plaintiff's Exhibit 34 and identify that photograph. A. That is a photo of a residence on Clifton Boulevard, showing, among other things, some sort of electrical or telephone switching box of some sort.

[41] Q. Would you turn to Plaintiff's Exhibit 35 and identify that photograph. A. That I believe is the corner of Bunts and Clifton in the City of Lakewood.

Q. What does it show on the right of way? A. It shows an RTA shelter and some sort of electrical or telephone pole, a telephone booth, and it looks like a "Don't Walk" sign, and some other signs here (indicating) that are partially hidden by a tree.

Q. Would you turn to Plaintiff's Exhibit 36 and identify that. A. Another photo of Clifton Boulevard.

Q. What does that show? A. It shows two mailboxes of sorts, one or two electrical—one is electrical because it

has streetlights on it, and the other, I don't know exactly what kind of a pole it is. It has some sort of fire or safety box on it, and the telephone booth, and the rubbish container, and an RTA shelter.

Q. Would you turn to Plaintiff's Exhibit 37 and identify that exhibit, please. A. The corner of Clifton and Edwards in the City of Lakewood.

Q. Can you tell from that picture whether Clifton is a State route? [42] A. Yes.

Q. What does the picture tell you? A. Well, there is a pole about—a little left of the center, that shows three routes, and I think 6 and 20 are Federal, and Route 2 is State, I believe that is correct.

Q. Do any establishments on Clifton sell The Plain Dealer? A. There are two motels around 118th and 120th on Clifton that get five papers a day for the people who use their facilities. There are strictly a house type paper.

Q. Those are the only sales on Clifton at the current time? A. Yes, sir.

Q. Would it be any problem for The Plain Dealer distribution if people taking the Clifton bus could walk to Detroit Avenue to purchase The Plain Dealer? A. Well, it is quite a walk. You have to cross a railroad tracks.

Q. What has The Plain Dealer found out about the people who purchase papers willingness to do that? A. In all of our surveys—

Mr. Fisher: Objection to surveys. I have not seen any surveys. I specifically requested if [43] there was a marketing report.

The Court: Sustained as to particular surveys.

By Ms. Newborn:

Q. Do you know whether persons who purchase The Plain Dealer in a newspaper vending machine are likely to walk two or three blocks to purchase such a newspaper?

Mr. Fisher: Objection.

The Court: Overruled.

A. My experience tells me that people generally buy a newspaper if it is close at hand. They are waiting for a bus, they are not going to take a chance of missing the bus by walking a couple of blocks to buy the paper and come back.

Q. I notice, Mr. Thrasher, on Plaintiff's Exhibit 2 that at eight of the locations that The Plain Dealer selected, that they are on Clifton. Why did they select this number of locations on Clifton? A. We felt these were areas of—first, they are at bus shelters, and secondly, we feel that they are at relatively high commuter and pedestrian traffic.

Q. Why does The Plain Dealer generally want to place newspaper vending machines in the City of Lakewood? A. We feel that we would like to be able to sell more [44] newspapers there, so we can disseminate the news more completely in the City of Lakewood.

Q. Does the delay of placing newspaper vending machines in the City of Lakewood have an impact on the distribution of The Plain Dealer? A. Yes. We lost circulation that can never be recovered.

Ms. Newborn: May I have a minute, your Honor.
(After an interval.)

Ms. Newborn: No further questions of this witness.

The Court: Mr. Fisher.

CROSS EXAMINATION

By Mr. Fisher:

Q. Mr. Thrasher, you stated on direct examination that sales of single copies were 25 percent of the single copy sales, and you indicated that you used a couple of

exhibits to make that calculation. A. Sales through vending machines are 25 percent of the single copy sales, and we do use a couple of exhibits in here.

Q. Can you tell us how you made the computation?

A. Sure, if I could turn to the exhibits.

[45] Q. You are looking at 19 and 20? A. All right. 19 tells me, for instance, on September 11 our net sales for the period was 131,571 papers in vending machines, and divided by days, and you got 21,928.5 per day that we know what we sold per day that week. And we go to the September—I guess the next exhibit, 20, PT-20, and you take the single copy average for this year and add them up and find out what percentage of those single copies was this figure of 21,928.

Q. You mean you added those numbers up and took an average? A. That is an average. These are averages.

Q. You are referring to what when you say "These are averages"? A. Well, we took—I will tell you the exact figures.

Q. Do you have the exact figures? A. Well, they are on the report. You add those up, and this is the city and suburban, and that is where the figures are from, and take that figure and find out what percentage 21,928 is of that figure.

Q. That is 24.8 percent? A. Approximately 25 percent.

[46] Q. And that is your daily circulation? A. Yes.

Q. What does "daily circulation" mean? A. It means those papers we circulate each day.

Q. Didn't you say in this deposition that this means Monday through Friday? A. Yes. Our daily figure means Monday through Friday.

Q. So when you are talking about daily circulation, and you say 77 percent are home deliveries, you are talking about Monday through Friday? A. That is right.

Q. And Saturdays and Sundays are in a different category? A. Yes.

Q. As far as the daily circulation, you are talking about this 24.8 percent is the percent of the sales through the vending machines of single copy sales? A. Yes.

Q. You further testified, did you not, that 23 percent of the total sales were single copy, not the home delivery; is that correct? A. 23 percent of those that are on the report of this monthly—yes, using these monthly figures.

Q. The paper carriers that bring the paper to the [47] home, that is 77 percent, and the other 23 percent goes through stores and vending machines and mail? A. Yes.

Q. Of that 23 percent, you are saying this 24.5 percent is through the vending machine? A. Approximately.

Q. Do you know what it computes out? Is that about 50 percent of the total sales? A. Well, 24 percent of 23 percent is 5 or 6 percent.

Q. That is daily, Monday through Friday? A. Yes.

Q. Now, when it comes to Sunday, your delivery is 80 percent? A. Home delivery is approximately 80 percent in the city and suburban areas.

Q. And what percent of the sales of the single copy sales are through vending boxes on Sunday? A. It is very, very small. I don't have that figure. I know we average around 5,000 to 5,500 vending machine sales in Greater Cleveland on Sunday.

Q. It drops way down? A. We don't use vending machines on Sunday because there is very little pedestrian and commuter traffic.

Q. You don't even stock them? A. That is right.

[48] Q. What about Saturdays? Is there a big drop-off on Saturdays? A. Very large dropoff.

Q. Because the people are mostly commuters and workers, Monday through Friday? A. That is correct.

Q. We are talking about possibly less than 1 percent on Saturday and Sunday? A. Saturday and Sunday—I am not sure of that figure.

Q. Can you give us any ball park? It's much less than 5 percent?

Ms. Newborn: I object to the "ball park."

The Court: Overruled.

A. I would have to have the figures in front of me.

Q. Don't you have the figures in front of you as to the single copy sales on Sundays? A. No.

Q. Is that in your exhibit? A. No. No; these are daily figures.

Q. Those are daily figures? A. Yes, on these two reports.

Q. Just take a look. You don't have the Sunday figures? A. Not in these two reports.

[49] Q. You can't give us a figure for Saturday or Sunday? A. Not off the top of my head.

Q. But you would agree that it is much less than 5 percent? A. I would agree that it is much less than daily. I don't know the exact percentage.

Q. Let me get it straight. Do you say that approximately 5 percent of the total daily sales are through the vending machines? A. Yes.

Q. And aren't you agreeing that Saturday and Sunday it is much less than 5 percent? A. It is less than 5 percent.

Q. Can you tell the Court the number of copies that you distribute through vending machines on weekdays as compared to Saturdays and Sundays from your documents?

A. From these documents?

Q. Yes. A. No.

Q. But you are saying you don't even stock most of these vending machines; is that correct? A. We don't stock at least 50 percent of them.

Q. So it is fair to say you are going to be down at least 50 percent to 2-1/2 percent through vending [50] boxes on a Saturday and Sunday? A. It is possible.

Q. Well, you are going to have a zero sales as compared to 100 percent in those boxes during weekends; is that correct? A. That is correct.

Q. With respect to the City of Lakewood, you have single copy sales being purchased in the stores in the City of Lakewood? A. We have many store outlets in Lakewood.

Q. You have had those for numerous years? A. Yes, to my knowledge.

Q. These are located along Madison and Detroit? A. Predominantly.

Q. You mentioned in the exhibits there are a couple of hotels on Clifton Boulevard. A. Yes.

Q. And was it your testimony that you can't buy a newspaper there over the counter? A. My testimony here?

Q. Yes. A. No.

Q. Why do you say that you only sent some papers there for the people to buy in the hotel? A. That is so the people in the residence, in the [51] motel or hotel, may buy the paper. There is a maximum of five that go in there on a daily basis.

Q. If I would walk into the hotel, I could buy one, too? A. I don't see why not.

Q. Right over the counter; is that correct? A. Yes, on the counter.

Q. Do you have any idea how many commercial outlets have The Plain Dealer in the City of Lakewood? A. I don't know the exact number, no.

Q. Do you have any idea what the number is? A. Maybe 25.

Q. 25 outlets? A. Maybe many more.

Q. There may be many more? A. Yes.

Q. This is something the circulation manager knows?

A. Yes.

Q. For that district? A. Well, we had—we have field supervisors that would know every store.

Q. But you believe that there is at least 25? A. I would say at least.

Q. Do you know how many of those are open all night, besides the hotels? [52] A. I don't know—but a number. I would imagine about 15, as a guess.

Q. Now, with respect to the actual circulation, would it be fair to say that you start the trucks rolling about what?—3:30, as far as going to Cleveland and the suburbs? A. No. Our trucks start rolling between 1:15 and 1:30. Our first starting time is at 1:30 to go to the suburban areas.

Q. The outlying districts? A. That is correct.

Q. During your deposition didn't you indicate as far as Lakewood and the closer cities, that you started the districts about 3:30? A. Between 3:00 and 3:30, yes.

Q. And the actual arrival would be probably an hour or so later? A. No. I think maybe 20 minutes. At that time there is not much traffic.

Q. So it is getting approximately to 4:00 o'clock? A. Yes.

Q. And at that time are you delivering the newspapers to the stores? A. Not at that time.

Q. Are you delivering the newspapers to the carriers? [53] A. Yes, the carriers get the first drop.

Q. I see; and do they continue on to drop the papers off at the stores? A. Yes.

Q. In other words, they don't come back, they just keep it as part of their routes? A. It depends upon the route. They meet the carriers, and if there is a store in the area, they drop at the store, just so they don't go back and forth.

Q. And just say the carriers are first, but if they have to make a trip back out, can you give us an outside time that the papers would be at the stores? A. I would say that about a half hour to 35 minutes after they start to run, after they reach the city and make their first drop, depending on the size of the route.

Q. So between 4:30 and 5:00 o'clock? A. We generally like to have it in the store by 5:00 a.m.

Q. That is your goal. Now, as to the daily sales, the stated price on the paper, the recommended price is 20 cents? A. On the daily, yes.

Q. Now, as far as the hotel price, through the vending machines and commercial establishments, isn't [54] it true that the price is 16 cents that The Plain Dealer receives?

Ms. Newborn: Objection on the grounds of relevancy.

The Court: You wish to be heard?

Mr. Fisher: Yes. I am trying to establish this is strictly an economic factor of this plaintiff. They don't have to pay anything for the devices. They have to pay the home delivery more, and they have to pay the stores a certain percentage, but with respect to the vending boxes, they are not paying anybody anything for the use of their service, and it will only take me a few minutes. I think it is very relevant.

The Court: You wish to be heard?

Ms. Newborn: I submit it is totally irrelevant.

Mr. Fisher: And if I may make a proffer, Your Honor?

The Court: Go ahead.

Mr. Fisher: If permitted to testify, the witness would state that the carriers—The Plain Dealer gets 12-1/6 cents for each paper, and the carrier gets the balance.

With respect to the stores, The Plain Dealer [55] gets 16 cents and the stores get 4 cents.

With respect to the newspaper boxes, The Plain Dealer gets 16 cents and the balance of 4 cents goes to the circulation manager who apparently keeps that as compensation.

(Close of proffer.)

By Mr. Fisher:

Q. Now, of those 25 outlets you said you had in Lakewood, were you including places where you had vending boxes located on property other than that which is owned by the City of Lakewood? A. No.

Q. You are not; so that is additional? A. That would be in addition to.

Q. And would it be fair to say from your last testimony that you had about eight vending boxes? A. No. I was incorrect in the deposition. There are about 14 or 15.

Q. 14 or 15 vending boxes? A. Yes.

Q. In the City of Lakewood? A. Yes.

Q. Could you give us the location of these? A. I can give you the locations of most of them. Some are inside, and I have never seen them. [56] We have one in a donut shop in Lakewood, and we have I believe one at Rini's and Pick-n-Pay, and two or three restaurants where they are inside, and there is a Bob's Big Boy that was outside, and there are a couple of apartment buildings on the Gold Coast.

Q. Those are the inside? A. Yes. And there are the restaurants, and they are both inside, and there are two, I believe, at RTA turnarounds, and there was one at a Marathon Gas Station, and those are all I can bring to mind right now.

Q. Could you tell the Court, not the exact location of each one, but where these are generally located, what streets in the City of Lakewood? A. Generally they are located on Detroit, Madison, and West 117th—excuse me, there are two on Lake Road.

Q. That is in the apartments? A. Yes.

Q. Those are not—okay. I am sorry. I understand your answer. Now—which leads me to the next question: What number of these are outside where they are generally accessible to the public? A. I suggest about 10 of the 15 or 16 are outside.

[57] Q. And these would be in along Madison and Detroit, primarily? A. Yes.

Q. Madison and Detroit are both in the center of the city, are they not? A. Well, I believe they are the two main commercial streets of the city.

Q. But the question is, they are approximately in the center of the city, are they not? A. I don't know the geographic center of the city.

Q. Well, look at Plaintiff's Exhibit 2. A. On Detroit it would appear to be in the center.

Q. And Madison is pretty close to that? A. It is right next to it, so that is relatively the center.

Q. Now, you testified that on direct examination that it was important to just have the circulation. You also indicated during the deposition that you had no marketing studies done in advance of your selection of these sites; is that correct? A. That is correct; no formal marketing study.

Q. The basis of the selection of these sites was strictly based on what your circulation manager thought would be a good job to try it? A. What our single copies sales manager thought.

[58] Q. And he is the person in charge in that area?

A. He is in charge of vending machine locations.

Q. I see. During your deposition didn't you testify that he left it up to the driver that has that particular area? A. Left what up?

Q. As to what sites to select. A. Well, I don't remember that testimony, but the driver will tell us if a site—whether or not a site is progressing properly. He is the one on a spot on a daily basis, and a single copy manager may select a spot and the driver will be the final determination whether or not it should be kept, based on sales.

Q. Now, getting back to these boxes that you have installed; isn't it true that no consideration whatsoever is paid for the location of those boxes on the private property?

Ms. Newborn: Objection—relevance.

The Court: Sustained.

Mr. Fisher: I would proffer it.

(The following proffer was made for the record:)

[59] Mr. Fisher: I would proffer that if the witness were allowed to testify, he would indicate that they pay nothing and will pay nothing for the use of other person's property, for the use of it.

(Close of proffer.)

Mr. Fisher: Could I be heard for one second?

The Court: Yes.

Mr. Fisher: The relevance, your Honor, is in the fact there are alternate channels of communication. I do think it goes to explain if they are claiming they

don't have alternate means of communication. One of the reasons for it is that they pay people nothing for the use of their property to locate the boxes which explains why they don't have more located on property, private property.

The Court: Still sustained.

Mr. Fisher: The proffer was that he would testify they do not, in that location, pay anyone money for the use of these sites on private property.

By Mr. Fisher:

Q. You do get consent for use of these places? A. Absolutely.

Q. How is the consent secured?

[60] Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Now, you testified that in a number of other cities, that you do have boxes located on the public property; is that correct? A. We do.

Q. In your deposition you indicated, did you not, that in about 12 or 13 cities, at least, you have certificates of insurance filed for the city, including them as a named insured for up to a million dollars in liability with respecting the placement of these boxes?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: I will proffer it.

(Thereupon the following proffer was entered upon the record:)

Mr. Fisher: I proffer for the record that if the witness were allowed to testify, he would indicate that they do have these certificates of insurance, and that there is no trouble in securing them.

(Close of proffer.)

[61] By Mr. Fisher:

Q. In the Greater Cleveland area, would it be fair to say that in addition to The Plain Dealer, that The New York Times is another paper that seeks a place to use vending boxes the same way as you would like to put them?

Ms. Newborn: Objection.

The Court: I don't know the relevance.

Mr. Fisher: The relevance is that The Plain Dealer is not the only news outlet attempting to put the news boxes on public property.

The Court: I assume that is almost stipulated from what we have here even before this Court.

Mr. Fisher: I would like to point out that in addition to The New York Times, the Wall Street Journal is using this, and the USA Today, and the Akron Beacon Journal, and the Willoughby News Herald, all are entering the ring to place these on public property.

The Court: Well, I would assume counsel would stipulate that others would have the same rights that they would have.

Ms. Newborn: Yes.

The Court: Proceed.

[62] Mr. Fisher: Is that so stipulated?

The Court: I think she said that is correct.

Mr. Fisher: All right.

The Court: I think I could take judicial notice of that, counselor.

Mr. Fisher: Thank you, your Honor.

By Mr. Fisher:

Q. Is it true, Mr. Thrasher, as of today The Plain Dealer has not applied for placing any machines on the City of Lakewood property under the ordinances? A. Correct.

Q. You stated that there was a loss of circulation based on the fact that you have not had these sites that you requested. What percentage of your total sales would this be? A. I have no idea.

Q. It is miniscule, is it not?

Ms. Newborn: Objection.

Mr. Fisher: It is a proper question.

The Court: I will determine what is a proper question, counsel.

Overruled.

Is it miniscule, insofar as you know?

By Mr. Fisher:

Q. Or do you have any idea as to that either? [63]

A. It is hard to determine what it would be. If we had the 16 boxes that we are allowed to have, and we sold the average of say 24 or 25 papers a day in each box, which we assume that we would, it would be in the vicinity of 800 to 1,000 papers a day, and that is significant.

Q. 800 to 1,000 in those boxes? A. If we sold—16 times 25—it is about 400, rather; but even that, 400 a day is not a miniscule amount in the newspaper business because we deal in one's. The newspaper business is in one paper at a time.

Q. When you arrived at the number of 20 per day, this includes vending boxes that are located in downtown Cleveland; is that correct? A. That is correct, yes.

Q. It includes vending boxes that are selling maybe six papers a day, does it not? A. It does.

Q. The ones in the downtown Cleveland area I presume you are filling more than one time a day? A. Some we do and some we do not.

Q. You have them right on Public Square along the main thoroughfares where there is a tremendous amount

of pedestrian traffic in the morning; is that correct? [64]

A. On Public Square, yes.

Q. Now, the people who are taking these buses are coming into the downtown area, are they not? A. Well they would be coming eastward, whether they come all the way downtown—I don't know the terminus of all of those routes on the 55, but I believe so.

Q. If they were coming into Cleveland, then there are numerous outlets, including the vending boxes, where the person could get a paper at the end of the ride; correct?

A. At the end of a ride, yes.

Q. You stated that what you are talking about as far as getting the papers out, that it was within 20 minutes; is that correct? A. I am sorry?

Q. From The Plain Dealer Publishing Company's location in Cleveland, it takes 20 minutes to get to Lakewood? A. I would say 20 or 25 minutes at the most, at the hour they go out.

Q. Now, in your affidavit that you signed on the 20th day of December, 1983, which is attached to a motion, and it says:

"Public awareness and good will are greatly enhanced by the newspaper vending devices. In addition [65] to a prime source of profit from advertising, there is a direct relationship between The Plain Dealer circulation and advertisements in The Plain Dealer.

"Estimates of the benefits, enhanced good will, and increased advertisement from the distribution in the newspaper vending devices cannot be reduced to a precise monetary amount."

Do you recall making that statement? A. Yes.

Q. Are you changing your statement now? A. No.

Q. So it still cannot be reduced to a precise monetary amount? A. The amount of advertising revenue can't

be reduced to a precise amount that we gain from any one vending machine or group.

Q. You indicated in the deposition that just the fact the vending box is up and The Plain Dealer's name is on there and people are passing by, and the name identification is there, and that is a value to The Plain Dealer; is that correct?

Ms. Newborn: Objection to the reference to the deposition without asking the question.

The Court: Sustained. It is not a proper way to use a deposition, counsel.

[66] Mr. Fisher: All right.

By Mr. Fisher:

Q. Isn't it true that just the placement of the box with the name under it, "The Plain Dealer," that this is a name identification advertisement sort of feature for people passing by in their cars or pedestrians, whether they buy a paper or not? A. Yes.

Q. And is it not also true that if you were to go to an advertiser, someone who is going to put an ad in your paper, that just the mere fact that you have these vending boxes standing, the number of them, that that would be a factor in which you could charge for the advertisement?

Ms. Newborn: Objection as to relevance.

The Court: Overruled.

A. May I answer that in saying an advertiser is looking at total circulation and not the ways in which circulation is obtained.

Q. If I am not mistaken, in the deposition didn't you indicate that this was a concern—

The Court: Again, you are not using the impeachment process the way it should be used in asking your questions. We already had an objection on that.

Mr. Fisher: I asked the question, and now [67] he is changing his testimony.

The Court: But you say, counsel, "On page such and such of the deposition," so counsel will refer to what you are talking about.

Mr. Fisher: All right.

The Court: You also ask the question, "Do you recall having made a statement in a deposition taken at such and such a date"—if that clarifies the issue.

By Mr. Fisher:

Q. Do you recall giving a deposition on March 12, 1984, in my office? A. I do.

Q. And did you receive a copy of that? A. Yes.

Q. And you read it through? A. Yes.

Q. Okay. While I am finding this, did you indicate the number of vending boxes that you have indicated to advertisers as a means of selling your charges for advertising? A. No.

Mr. Fisher: I can't find it, so I will go on to another question.

[68] By Mr. Fisher:

Q. Now, looking at Plaintiff's Exhibit 1, in addition to the name of the paper, are there any other spots for which there is advertising of any kind on these devices that you use? A. On the majority of the devices that we use we have a logo on either side of the box which can be construed as advertising, and there is a place in front of the box for an identification card which is basically advertising, and maybe a contest that we are having, or something is in the paper or a section of the paper, or something of that sort.

Q. This sort of advertisement is shown in some of the exhibits that you referred to already, is it not? A. Yes; the logo is.

Q. Take a look at Plaintiff's Exhibit 4, would you please. A. Yes.

Q. Is there advertising on the side of that machine, something other than The Plain Dealer's name? A. On the side?

Q. Yes. A. Nothing other than The Plain Dealer's name and the logo.

Q. How about on the front below where you get your [69] newspaper? A. We put an identification card on there, so we can tell at what corner that particular box was.

Q. And that is where you would put in advertisements if you wish to put it there? A. We could put it there, yes. That is the location for it.

Q. And in fact you do that, do you not? A. In most cases, yes.

Q. You charge a fee for advertising for somebody else on that space? A. We don't use other people.

Q. You advertise only your own products? A. That is correct.

Q. Now, you said you have been using these newspaper boxes for 10 years; is that correct? A. About 10 years; that is correct.

Q. But there has been a great increase in the last, say, three years; is that correct? A. A steady increase.

Q. And when would you say you got to the halfway mark from where you are now? A. It was prior to my being in the department.

Q. You started in the department in September of 1983? A. No, no. I started in the department in March of [70] 1979.

Q. March of 1979. How many news boxes did you have out at that time? A. Without the records in front of me, I couldn't give you an answer.

Q. Ten years ago how many news racks did you have out? A. Well, again, I was not in the department at the time, so it would be a mere guess.

Q. What is your goal for placing these news racks in the next year? How many more in the Cuyahoga County area? A. We would like to have 1,000 in the racks altogether.

Q. 1,000 more? A. No, 1,000 racks in the Cuyahoga County, basically the city-suburban area, which I defined before.

Q. Now, when you started in in September of 1983, the news racks that you indicated were installed in Lakewood, they were already in place, were they not? A. Yes.

Q. Would it be your opinion that the main reason for allowing these newspaper boxes at the site that you selected in Lakewood would be the convenience of the people using the buses and walk by; is that correct? [71] A. Yes.

Q. You are not saying that people would not necessarily stop their car and try to buy newspapers from these devices, are you? A. I am not saying that, no.

Q. You are saying it does happen? A. Yes.

Q. Your intent is to sell papers, whether it is somebody driving a car and stopping or walking by or commuting on a bus? A. Our main intent is to sell to the commuters and pedestrians. If people want to stop their car and buy the paper, fine.

Q. This is a convenience, especially to people catching the bus; is that right? A. Correct.

Q. Now, in your direct examination you mentioned bus shelters. Why would you mention bus shelters being located in a right of way? Is that a justification for you having your box there?

Ms. Newborn: Objection.

The Court: I don't understand. Sustained.

By Mr. Fisher:

Q. You mentioned a number of items that were in the [72] right of way. I think it was a bus shelter, traffic signals, telephone booths; and do you recall that? A. The devices on the various pictures?

Q. Yes; switching boxes. A. Yes.

Q. Do you place The Plain Dealer boxes in the same classification as those items?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Please tell me the significance of taking the pictures showing these devices in the Lakewood right of way.

Ms. Newborn: Objection.

The Court: Sustained. You can argue that as to the relevance of the exhibit.

Mr. Fisher: I move—

The Court: When the time comes, you may.

By Mr. Fisher:

Q. Now, these news boxes that are installed, how are they affixed to the ground? A. There are several methods that can be used.

Q. Most commonly how is it affixed? A. Most commonly in most areas they are either chained to some fixed object, or there is a concrete [73] block put in at the base of them to hold them steady.

Q. Now, in the business of the distribution of newspapers, you use trucks; is that correct? A. Yes.

Q. Do these trucks have license plates from the State of Ohio? A. Yes.

Q. When your truck drivers use parking lots and parking places next to parking meters, do they pay the fee for using the spot?

Mr. Fisher: Do you wish to hear from me?

The Court: I suppose you have a regulation?

Mr. Fisher: It is a charge for using the spot.

The Court: I will sustain the objection.

Mr. Fisher: The question that I would like—

The Court: I have sustained it.

Mr. Fisher: I would like to proffer the answer.

The Court: Go ahead.

(Thereupon the following proffer was entered upon the record:)

[74] Mr. Fisher: If allowed to answer, the witness would indicate that the drivers of The Plain Dealer vehicles pay and are required to pay the parking fees the same as anyone else using the parking spaces.

(Close of proffer.)

The Court: What about bus drivers?

Mr. Fisher: When they stop to pick up people at designated bus stops, there are no parking meters.

The Court: So if they stopped at some place other than a designated spot, they would be required to pay a parking fee?

Mr. Fisher: That is correct.

By Mr. Fisher:

Q. Do your drivers use the Turnpike? A. No.

Q. They don't make any distributions along the Turnpike? A. The Ohio Turnpike?

Q. Yes.

Ms. Newborn: Objection.

The Court: Sustained. You may say what he might say the—

Mr. Fisher: I would like to proffer what I think the answer would be.

[75] The Court: All right.

(Thereupon the following proffer was entered upon the record:)

Mr. Fisher: If the Witness were allowed to answer, he would state that the driver's used the Turnpike, and he would also say that they paid a fee for using the Turnpike, the same as all the other vehicles of the classification using the Turnpike.

(Close of proffer.)

The Court: I don't generally recess as often as I do in a jury trial, but if anyone wishes to have a recess, don't hesitate to ask.

By Mr. Fisher:

Q. These boxes that you place, is it true they are 49 inches high? A. Approximately. I don't know the exact—

Q. You want to look at Plaintiff's Exhibit 1? A. Yes.

Q. They are 19 inches wide? A. Yes.

Q. And 16-1/2 inches deep? A. 16-1/4.

Q. You say at some places you do weight them down? [76] A. Yes.

Q. Do you know what they weigh? A. About 100 pounds for the box itself.

Q. Now, in Plaintiff's Exhibit 19 you have a percent column; is that correct? A. Yes.

Q. And what that indicates is the percent of papers that you actually sold that were not otherwise taken; is that correct? A. Yes. This is a percentage. It is determined by taking the gross copies and subtracting the returns and getting what we have called a net sale; and you take the potential cash versus the actual cash and get a percentage, and you find out basically how many papers were stolen from the boxes.

Q. And basically from looking at the column it is fair to conclude that 75 percent of the papers are sold and the other 25 percent are stolen? A. Yes.

Q. Do you have any robberies of the boxes themselves? Are they stolen? A. Yes.

Q. How many occur during a year? A. We lose about an average of one a month.

Q. Can you tell us of any instances where the boxes [77] are unchained and knocked down and they have to put them back up again? A. I can't tell you every specific instance.

Q. But this has occurred? A. I am sure it has occurred.

Q. Now, with regard to cleanup around the box, would it be your testimony that your drivers would refuse to clean up paper and debris that might blow against the boxes? A. I don't know whether they would refuse directly to clean up all of them. Our drivers are instructed to clean up any debris which they create. Some drivers are more fastidious than others and would clean up anything right around the box, and some would not.

Q. And because of the union agreement, you can't force them? A. That is correct. The only thing we can force them to clean up is what they create.

Q. Isn't it also true, the only maintenance program you have with respect to clean up is once per year? A. We have a specific program that once a year we do have them clean up around the outside.

Q. And otherwise during the year you have no program [78] for that; is that correct? A. We have no written program, no, although some drivers will clean their boxes on their own.

Q. Now, as to the architectural review, isn't it a fair statement that you had a variety of colors that you are willing to use to accommodate placement of these devices wherever they will accept them? A. Yes.

Q. And isn't it also true that you had a variety of shapes, including the pedestal type, as well as the ones indicated in Plaintiff's Exhibit 1 that you are willing to use as an accommodation to the person whose property you place it on? A. There are two basic shapes. There is the shape in this Exhibit No. 1 or Exhibit No. 2, whatever it is, and there is the pedestal style which we use after consultation and discussion with the various businesses or whatever.

Q. So if you want to place it, say, as in a restaurant, you would talk to the owner of the place and sell them, whatever, and try to come to some agreement as to the type that they would like to have on their place; isn't that correct? A. We generally bring in the TKY steel rack, and if [79] there is an objection, then we show them what else we have available, and then try to come to an amicable arrangement.

Q. Okay. As far as architectural review of the City of Lakewood, you were referring to Section 901.181 when you said there were no standards? A. I don't know the exact number of the ordinances, but there are no standards for the Architectural Review Board.

Q. I show you what is marked as Plaintiff's Exhibit 4, and I would ask you if you have reviewed that language.

The Court: Plaintiff's Exhibit 4?

Mr. Fisher: Excuse me, it is Joint Exhibit 4. It is a joint exhibit.

The Court: I see. All right. What is the question now?

Mr. Fisher: I am asking him to look at that to be sure we are referring to the same section.

The Witness: That is not the Mayor, it is?

By Mr. Fisher:

Q. Well, continue reading. This is the section that you are talking about. A. It just says, "The design of such devices shall [80] be subject to approval by the Architectural Board of Review."

The Court: Where are you reading?

The Witness: 901.181(a), the last sentence in (a).

The Court: All right.

By Mr. Fisher:

Q. And this is what you referred to when you testified on direct examination, that there are no standards?

A. None that I can see, yes.

Q. This is what you are referring to? A. Basically, yes.

Q. Well, basically I want to know what you are referring to. A. I was referring to that.

Q. And were you referring to anything else? A. No.

Q. Calling your attention to page 50 of the deposition, the question of:

"Q. I am saying, if the Architectural Review Board requested, there would be no difficulty, would there?

"A. Oh, yes. I am absolutely willing."

Do you recall making that statement?

Ms. Newborn: Objection.

[81] The Court: Sustained.

By Mr. Fisher:

Q. Do you recall stating that you do have a pedestal type as well? A. The pedestal type vending machine—we have those, yes, sir.

Ms. Newborn: Objection.

Q. You are offering that, is that correct?—I am sorry —you offered that?

Ms. Newborn: I don't understand the question.

Mr. Fisher: I am asking him the styles that you offer the various people.

The Court: He already testified to that.

Mr. Fisher: Okay.

Excuse me a moment.

The Court: Let's take a five-minute recess.

(Recess had.)

By Mr. Fisher:

Q. Mr. Thrasher, would it be true if people intended to buy a newspaper that in a lot of cases, just because they couldn't buy from a box at the bus stop, that they may just as well buy it some place else? A. Generally speaking people do not want to walk a [82] long way. It is kind of an impulse thing. If it is there, they buy it. They won't walk.

Q. And in some cases if they are taking the bus downtown, they might get the paper when they get downtown?

A. In some cases it is true.

Q. It is kind of difficult to pinpoint exactly how much your losses would be; is that correct?

Ms. Newborn: Objection.

The Court: Overruled.

A. We find that the majority of the people would buy them when they are getting on the bus for something to read going downtown.

Q. You said "a majority"? A. A majority of the people who buy it will buy it when they get on the bus. It is like to pass the time.

Q. Has there been any study that produced that result, or is this your opinion? A. That is my opinion.

Q. And there are a number of people that will buy it anywhere, wherever they get the newspaper? A. Sure.

Q. Did you say on direct examination that all of the other cities in Cuyahoga County have newspaper [83] vending devices on the public right of way? A. I believe I said almost all.

Q. You said all except the City of Lakewood. Do you recall saying that?

Ms. Newborn: Objection.

The Court: He may answer.

A. I believe I said almost all.

Q. So there is more than just the City of Lakewood where you don't have these devices located; is that correct? A. Is that correct?—I can't think of any other community right offhand where we don't have a vending machine in the community.

Q. How about Bay Village? A. Yes; there is a machine.

Q. On public property? A. Not on public property.

Q. You have vending machines in Lakewood not on public property? A. Yes, I am sorry. I misunderstood what you were saying. On public property, there are other communities where we do not have them on public property.

Q. In your direct examination you indicated delay as I recall was your main objection to the Lakewood [84] ordinance. Is my impression correct—that is your major objection? A. It is one of my objections.

The Court: Is that your major objection?

Ms. Newborn: Objection.

The Court: Overruled.

A. I don't know whether I could classify it as a major objection or not. The Architectural Board of Review is kind of a major problem with us. They are almost fairly equal, the two.

Q. The Architectural Board of Review—was it your testimony that there would be a delay and there are no standards; is that correct? A. Yes.

Q. But delay is part of your objection? A. Yes.

Mr. Fisher: I have no further questions.

Ms. Newborn: Nothing.

The Court: You may step down.

Ms. Newborn: Your Honor, we have no further witnesses.

Mr. Fisher: Your Honor, counsel told me in the hallway that she was not going to call further witnesses at this time, and she indicated that she had [85] an expert witness, so I am not completely prepared to move ahead at this point. I thought she was calling another witness.

The Court: When will you be prepared?

Mr. Fisher: I can be prepared in an hour.

The Court: All right. How many witnesses do you anticipate?

Mr. Fisher: That I will call?

The Court: Yes.

Mr. Fisher: I think it is six.

The Court: I take it none of the six are here?

Mr. Fisher: I have one, but I wanted to go over these items of testimony one more time before I put him on. I thought I would have the lunch hour to do that.

The Court: All right. We will recess until 1:00 o'clock.

Ms. Newborn: Thank you, your Honor.

(Luncheon recess had.)

[86] APRIL 11, 1984; 1:00 P.M.

The Court: Please be seated. Are we ready to proceed?

Ms. Newborn: I would at this time offer our exhibits into evidence.

The Court: All right.

Ms. Newborn: We would offer Exhibits 1 through 37, and they have been identified, and 41 through 44.

Additionally there are Joint Exhibits 1 through 4 that I would like to have offered into evidence.

Finally, your Honor, I have an exhibit marked as 38. That is a map of Cuyahoga County highway system which shows the highway designations for Clifton Boulevard.

The authenticity has been stipulated to, and I would like to offer that into evidence as well.

The Court: All right. Mr. Fisher.

Mr. Fisher: I am objecting to the introduction of any exhibits that were not testified to, and that would be the photographs.

The Court: Take 1 through 37, Mr. Fisher.

Mr. Fisher: I don't believe there is any [87] testimony about 21 to 32.

The Court: Just stick with 1 through 37 right now. You don't have any objections to 1, I take it?

Mr. Fisher: No, your Honor.

The Court: I take it you don't have any objection to No. 2?

Mr. Fisher: No objections to No. 2, and Exhibit 3 through the ones about the sights goes through 18, and there is no objection.

The Court: 3 through 18, no objection. 19, I take it, you have no objection?

Mr. Fisher: No.

The Court: 20, I take it you have no objection?

Mr. Fisher: No.

The Court: 21, I take it you have no objection?

Mr. Fisher: Right.

The Court: 22, did you say you object to that?

Mr. Fisher: Yes.

The Court: I don't recall any testimony as to that exhibit.

Ms. Newborn: Then I inadvertently omitted [88] that.

The Court: Well, we will sustain the objection to that.

Ms. Newborn: Okay.

The Court: 23. I think that is in the same category, and we will sustain the objection.

Mr. Fisher: The same objection through 27.

The Court: 24, 25, 26, and 27, I will sustain the objection.

Ms. Newborn: The bus schedule, your Honor, there is a stipulation that indicates that they are true and accurate copies.

The Court: That is 28.

Ms. Newborn: 28 through 31.

Mr. Fisher: No objection. I don't care about the bus schedule.

The Court: Okay. No objection to 28 through 31.

Mr. Fisher: No objection.

The Court: All right. 32.

Mr. Fisher: 32, I object to.

The Court: 32, there was testimony as to 32.

Mr. Fisher: There was testimony, and I [89] asked the significance of identifying these objects in cross-examination, and I couldn't get anything. That is why I object to the entry. It doesn't show anything. It is not significant.

The Court: Received over objection. Now, 33.

Mr. Fisher: The same objection. I was not allowed to ask as to the relevance, so I object.

The Court: Received over objection. 34.

Mr. Fisher: Objection, same grounds.

The Court: Received. 35.

Mr. Fisher: Objection.

The Court: We will receive it. 36.

Mr. Fisher: Objection on the same grounds.

The Court: Received; and 37.

Mr. Fisher: Objection on the same grounds.

The Court: Received over objection. The next is 40, I take it?

Ms. Newborn: Well, 38 is the highway map which originally—I agreed to make the joint exhibits, and because we didn't have enough copies, he said, "Make it yours."

Mr. Fisher: I don't see what the relevance is. We have testimony as to what kind of a route [90] Clifton Boulevard is, and it clutters up the record. I didn't object to the testimony. We can stipulate what the route is, that Clifton Boulevard is.

Ms. Newborn: We think it graphically depicts Clifton as part of a State and Federal highway system, and I believe one of Mr. Fisher's witnesses can talk about this map, and I can hold it till that time.

The Court: All right. 38 is not offered.

Ms. Newborn: 39 is not offered.

The Court: 40.

Mr. Fisher: 40 is objected to.

The Court: Received over objection. 41.

Mr. Fisher: Objection.

The Court: Received over objection. 42.

Mr. Fisher: Objection.

The Court: Received over objection. 43.

Mr. Fisher: Objection.

The Court: Received over objection. 44.

Mr. Fisher: Objection.

The Court: Received over objection. The next one was Joint No. 1 through Joint No. 4. Any objections?

Mr. Fisher: No. We stipulated to those.

The Court: All right, Joint 1 through 4 [91] received, and 38.

Ms. Newborn: 38 was the map.

The Court: Okay. All right, you are going to hold that?

Ms. Newborn: Yes.

The Court: All right. Those exhibits may be received. With that, does the plaintiff rest?

Ms. Newborn: The plaintiff rests.

The Court: All right. Mr. Fisher, the Court received a call from you about another matter that you were involved in in Common Pleas Court.

The Court appreciates you calling, but the Court suggests the better way to have done that would have been to have been here on time at 1:00 o'clock and converse with the Court about that matter at that time, or—and I think that what the Court is going to argue now is, will a recess of this case around between 3:30 and 4:00 o'clock help you out, sir?

Mr. Fisher: Yes, it would.

The Court: All right. Sometime before 4:00 o'clock we will recess.

Mr. Fisher: I can be back and there—

The Court: Right now we are going to go ahead to trial, but bear in mind the next time [92] please don't do that with this Court.

Mr. Fisher: I apologize.

The Court: That is all right. I want to set it straight.

Mr. Fisher: I called before 1:00 o'clock and was unable to reach you.

The Court: I understand. Let's proceed.

Mr. Fisher: You are saying?—

The Court: I said between 3:30 and 4:00 o'clock we will recess the case until tomorrow morning.

Mr. Fisher: I understand.

The Court: All right. Proceed.

[93] ROBERT FINNEY, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name. A. Robert Finney.

Q. And your address? A. 2087 McKinley, Lakewood.

Q. How long have you lived there, sir? A. Since 1962, May of 1962.

Q. Did you have any office or position with the City of Lakewood? A. I am a volunteer member of the Architectural Review Board of the City of Lakewood.

Q. And in that position do you sit on a Board that has more than one function, the same people? A. Yes.

Q. And what is the other Board that the same group of people comprise? A. The same group of people make up the Board of Building Standards and Appeals.

Q. How long have you been in the position as members of these boards? A. I began my sixth year January of this year.

[94] Q. How many years as a member of the Architectural Board of Review? A. The Architectural Review Board function was established a year or two later at the Board of Building Standards and Appeals, so I would have been a member on the architectural part of it about—this would be probably my fourth year.

Q. Would you take the exhibits in front of you and look at Exhibit EE. A. Okay. I have Double E.

Q. Is that a copy of the chapter regarding the Architectural Board of Review? A. It says "Chapter 1325, Architectural Board of Review," and then it says, "For establishment of the Board membership, purposes, authority, and review of plans and specifications."

Q. And is this the Board that you are talking about of which you are a member? A. Yes. It says that the ordinance was passed 3-5-79.

Q. Referring to Section 1325.03, there is a reference to an architectural standards workbook? A. Yes.

Q. And behind the codified ordinance provisions do you find a copy of the document they are referring to? [95] A. Yes. There is a copy of the Lakewood Architectural Standards Workbook.

Q. Are these the documents under which you operated as a member of the Board of Architectural Review? A. Yes. A copy of this workbook was given to each Board member at the time that the Board was created.

Q. Could you tell the Court who it was that developed this Architectural workbook standards or standards workbook, excuse me. A. I was not involved at the time in it, so I can only tell you what I know after the fact, that this was developed by an architectural firm that I understand was hired to develop it.

Q. Is one of the architects associated with the Board today?

Ms. Newborn: Objection, your Honor.

The Court: Sustained.

By Mr. Fisher:

Q. On page 3 of the Architectural Workbook Standards there is a name of the architect that drafted this. Do you recognize any of the names there as persons being on the Board? A. Yes. The name of Roland Volmer is presently a member of the Architectural Review Board.

Q. Calling your attention to—excuse me—and he [96] is an architect? A. Roland Volmer is a practicing architect, yes.

Q. Calling your attention to Section 1325.04, and I would ask you to read the first sentence of that. A. 1325.04: "Authority of Board. The provisions of this chapter shall apply to all new construction and construction which alters exterior elevations wheresoever situated within the city, including construction by the City, the Building Commission shall"—

Q. That is all I want for now. A. Okay.

Q. I note that memo was adopted in 1981, and the question is prior to the adoption of the amendment could you tell the Court the extent of the authority of the Board?

The Court: Prior to when?

Q. Prior to the adoption of the amending ordinance Ordinance 75-81. A. It is my understanding that prior to that the authority of the Board pertained to construction within the city, but I had a question, did it also include city property?

Q. I see. Let me ask you this: You were aware of the changes in 1981? [97] A. Yes. It is my understanding that is why the change was made, to make all activity within the city subject to the same authority.

Q. - Now, prior to that was commercial covered? A. Yes.

Q. Was residential covered? A. Yes.

Q. But including the city was not covered? A. It was my understanding, and as a member of the Board, some of us felt that we should have the opportunity to review construction such as might be contemplated by the city.

Q. Getting to the procedure under which you operate, would you indicate to the Board, after an item is brought to your attention, what the procedure is in disposing of it with the architectural review?

The Court: You meant to say "the Court." You said "the Board."

Mr. Fisher: I am sorry.

A. Yes. An applicant wishing to do construction in the city, that would be subject to review by the Board in the course of the permit procedure and goes to the building department, and at that point learns if they don't already know, if they must appear before the Board.

Q. Would you give it to the point where something [98] is actually submitted to you and what you do after that. A. The members of the Board are made aware that something has been submitted, so that prior to the formal meeting on the second Monday of every month they can view the proposed construction site and look at the surrounding properties, and so forth, and then at the formal Board meeting the applicant presents his evidence of what he wants to do.

Q. And is there any other evidence taken at that point? A. Since there is a legal public hearing, there might be persons who have an interest in the surrounding property, owners, or something of that nature, that might appear and testify.

Q. And is there testimony from a city official as well?

A. Yes. The Building Department is required to be

present during the Board meetings, and the Building Department may be asked questions, and they may ask to be heard.

Q. And after that is there a deliberation by the Board and public comments, and so forth? A. Yes, there is. Each Board member is given the opportunity—I should state that in my function as chairman I conduct the meeting, and I solicit [99] testimony, if you will, and each Board member is given the opportunity to ask questions and to address the subject under discussions.

Q. And after that I take it that you make some sort of decision? A. When all of the testimony has been heard, when there is no person further wishing to speak, then as chairman I ask for a motion from the board. If a motion is forthcoming, and it usually is, then a vote is taken.

Q. Okay. Aside from sign cases, would you indicate to the Court what the percentage of the cases that come before you are, some indication in the commercial districts? A. I don't have specific numbers at hand; however, I can tell you that the largest numbers of items considered by the Architectural Review Board would be signs. Next would be items of architectural and architectural storefront renovation. It would be more than 50 percent of the activities.

Q. You are talking about the remaining or including the signs? A. No. I am excluding the signs.

Mr. Fisher: No further questions, your [100] Honor.

CROSS EXAMINATION

By Ms. Newborn:

Q. Mr. Finney, you are the Chairman of the Architectural Review Board? A. Yes.

Q. And you have been for four years or approximately five years? A. I have been Chairman of the Architectural Review Board since it has been in existence.

Q. And you are not an architect? A. That is correct.

Q. And you don't have advanced training in architecture? A. No.

Q. And you have no formal training in art? A. That is correct.

Q. The Board, as I understand it, is made up of five individuals; is that correct? A. That is correct.

Q. And of these five, two are architects? A. Two are practicing architects.

Q. So that when the Board votes on a proposal, the proposal is either passed or not passed by a simple [101] majority vote; is that correct? A. That is correct.

Q. And with two members of your board having architectural training, if those two members were to pass on a design, it could still come up and not be approved; is that right? A. That is correct.

Q. And in reverse, even if both architects favor a design, it is nonetheless, it could be disapproved by the rest of the Board? A. That is correct.

Q. As I understand it, it is the function of the Board to approve proposed designs in the construction in the city? A. Yes.

Q. And the purpose is to direct some type of architectural consistency? A. Yes.

Q. Currently would it be correct to say that the city has a great variety of architectural styles? A. Yes.

Q. And when somebody wants to construct a building in the City of Lakewood, they have to apply to you for design approval? A. They apply to the Board for architectural [102] approval.

Q. And your role on the Architectural Board of Review, as I understand it, is to decide whether the design is appropriate in a particular area? A. Appropriate for the particular structure in that area.

Q. And every design submitted to you is unique; is that right? A. They have been so far.

Q. And there are not any exact standards that you can apply from design to design, are there? A. The standards that are stated in the workbook that we referred to earlier.

Q. But there is no exact standards that you can apply from design to design, are there? A. Just the standards stated in the workbook.

Q. And those are not exact standards that cover every design, are they?

Mr. Fisher: Objection.

The Court: What is the objection?

Mr. Fisher: That is making a statement, "Those are not exact standards as to the design."

The Court: To every design. That is a question, not a statement.

Mr. Fisher: It is a double question. [103] There is not an exact standard.

The Court: Overruled. Read the question.

(Thereupon the pending question was read by the court reporter as follows:)

"Q. And those are not exact standards that cover every design, are they?"

A. That is correct.

By Ms. Newborn:

Q. Isn't it a fact that about as specific as you can be in terms of a standard is to say that you try to determine what is appropriate; is that right? A. That is correct.

Q. If somebody is proposing a design for a new building, they have to wait for a formal meeting of the Architectural Board of Review to find out if their design is approved? A. Oh, yes.

Q. And the Board meets only once a month; is that correct? A. The Board has a formal meeting every month.

Q. So that an applicant could be waiting up to one month before the Board acts on his application; is that right? A. From time to time they fail to appear.

Q. Yes. [104] A. If they file the day after the Board meeting, they would have to wait until the following meeting.

Q. As I understand it, Mr. Finney, you identified the architectural workbook, and I don't remember exactly what the exhibit number was—Double E, the architectural standards workbook, Double E, as playing some role in your position as chairman of the Architectural Board of Review; isn't that right? A. I think we should clarify it. It plays a role in my position as a member of the Board, not as the chairman.

Q. This is the workbook for the Architectural Board of Review, Defendant's Exhibit EE? A. I have a problem with the word "workbook." It is a reference work that the Board members would use.

Q. And the Board members use this only as one reference among many others? A. I don't know what the others do, but in my case it would be a major reference work.

Q. Your major reference—do you know whether there is any reference in the workbook for residential property? A. Not without looking at the table of contents.

Q. When you are considering the design of the [105] building, you do not always make reference to the workbook, do you? A. That is correct.

Q. Primarily the book exists as an assistant mechanism to the applicant; is that correct? A. That is correct.

Q. And you make only occasional references to it? A. I make occasional references to it yes.

Q. Do you know whether there are any standards in the exhibit, Defendant's Exhibit EE, that are applicable to newspaper vending machines? A. Subsequent to your taking my deposition, I looked in the book, and I did not find a specific reference to newspaper vending machines.

Q. So there is no such standards? A. Not that I could find.

Q. Has anyone ever consulted with you in regard to your opinion on whether there should be the placement of newspaper vending machines on property along the streets in the City of Lakewood? A. Prior to your taking my deposition, no.

Q. So no one consulted with you before the passage of Section 901.181 of the Codified Regulations of the City of Lakewood? A. That is correct.

[106] Q. When the bus shelters were put up, the Architectural Review Board didn't play a role? A. That is correct.

Q. And when a telephone pole was put up, the Architectural Board did not play a role? A. That is correct.

Q. And these are on the public right of way; is that correct? A. That is correct.

Q. Are you aware whether Section 901.181 provides that there has to be approval of the design of the newspaper vending machines by the Architectural Board of Review before such a vending machine can be placed on public property along the streets in the City of Lakewood? A. I am not.

Q. At this time you have no standards to apply approving the design of the newspaper vending machines? A. The Board has not developed standards, no.

Ms. Newborn: I have no further questions, your Honor.

Mr. Nelson: No questions, your Honor.

[107] RE-DIRECT EXAMINATION

By Mr. Fisher:

Q. With respect to the bus shelters and the telephone booths, will you tell the Court whether these installations occurred before or after the jurisdiction of the Architectural Review Board was extended in 1981? A. It is my understanding that they came into being prior to the Board having jurisdiction. If I might add, the Board would—I am speaking as a Board member—the Board would take an active interest in approval of such if it had jurisdiction.

Q. With respect to—

The Court: Let me ask this question. At that time were there any standards for bus shelters?

The Witness: No.

The Court: Not since 1981?

The Witness: If that is when the ordinance was enacted, but it has not been presented to the Board by anybody, so the Board has not studied the matter.

The Court: So there has been no construction that was brought of the bus shelters since the ordinance was enacted?

The Witness: That is correct. I think I [108] should clear it up for the Board.

The Board receives applications and considers items. The Board does not seek out items to consider.

The Court: In other words, you wouldn't consider standards until you received an application?

The Witness: Unless someone asked us to.

By Mr. Fisher:

Q. Mr. Finney, in that respect, isn't it true with regard to any construction that is done? A. Yes.

Q. And indicate to the Court what are the considerations of architectural review as to appropriateness. A. Whenever any item of a construction nature is brought to the Board, the Board members are instructed to be guided by the standards in the workbook and to use their own business judgment as to the appropriateness of the planned construction.

I should mention that the two members of the Board that are architects I view as experts, and I receive with interest their opinions as to the appropriateness of the proposed construction.

If I might say, I use them as in-house experts if you will.

Q. Now, with regard to the vending boxes, newspaper dispensing devices, would your Board entertain an [109] application for multiple sites and treat it all at one time?

A. The Board would have no problem with that.

Mr. Fisher: No further questions.

The Court: If you have no standards, how would I know what guidelines to follow if I wanted to put a newspaper vending device in Lakewood? How would I know before I filed my application to tell you what I wanted to put there?

The Witness: The question that is asked of us most frequently is what do we want, and we refer the applicants to this book and say, "Be guided by what you see in that book."

I think the Board has tried to avoid a typewritten or published list of standards from the point of view it might be too restrictive on the applicants.

We have tried in all cases to make our decision in the applicant's benefit.

The Court: What would I be guided by in the book?

The Witness: Obviously they are talking about bus shelters and telephone booths.

The Court: How about a vending machine?

The Witness: An addition would have to be [110] made in the book.

The Court: There is nothing in the book?

The Witness: Not yet.

By Mr. Fisher:

Q. Are there a number of constructions that are done when it has to be reviewed for the first time? A. There are a number of constructions that are submitted that are deferred or not passed and approved on the first presentation, so the applicant develops further materials and provides additional information, and so forth.

Q. Mr. Finney, referring to Section 1325.03 of Exhibit Double E— A. 1325?

Q. —.03. A. Okay.

Q. Read the first sentence of that section. A. "The purposes of the Board, the purposes of the Architectural Board of Review are to protect the value, appearance, and use of property on which buildings are constructed or altered to maintain a high character of community development, to protect the public health, safety, convenience, and welfare, and to protect real estate within the city from [111] impairment or destruction of the values."

Q. Are these the factors that are taken into account in the deliberations of your Board? A. Yes, sir, hopefully all of the time.

Q. And as well as the rest of the section? A. Yes, and may I mention that that sentence is read prior to

the reading of the docket at every meeting so that every person present is aware, and so the Board members are reminded of what their duty is.

Mr. Fisher: No further questions.

Ms. Newborn: No questions.

The Court: You may step down.

Mr. Nelson: Nothing.

The Court: I am sorry. You may step down.

Call your next witness.

[112] MICHAEL JOSEPH CONNORS, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name, please. A. Michael Joseph Connors.

Q. And your address? A. 3901 Riveredge Road, Cleveland, Ohio.

Q. And your present position with the City of Lakewood? A. City Engineer.

Q. How long have you held that position? A. Since February of 1982.

Q. And prior to that were you employed in the City of Lakewood? A. Yes, as the Assistant City Engineer, which I took that position in July of 1981.

Q. And prior to coming to the City, was that your first position with the City of Lakewood? A. That is correct.

Q. Prior to coming to the City of Lakewood, were you working? A. I worked for an environmental consulting engineering [113] firm by the name of Havens & Emerson.

Q. What type of work? A. I was a consulting environmental engineer, a design engineer.

Q. Did you have any other jobs just after graduating from college? A. I started at Havens & Emerson upon graduation.

Q. Indicate to the Court what your education is. A. I have a Bachelor of Science Degree in Civil Engineering at Cleveland State University, 1977, and a Master in Business Administration from Baldwin Wallace, 1981.

Q. Now, calling your attention to the streets, sidewalks and tree lawns in the City of Lakewood, did you have occasion to conduct a study as to the extent of the ownership of the right of way by the City of Lakewood? A. Yes, I did. I was given by our law director 16 proposed sites for the location of newspaper dispensing devices upon which I dispatched the City's sidewalk inspector to create sketches to include any and all details and appurtenances at these sites. These sketches were then formalized.

The Court: Can't we save time? Are we talking about Plaintiff's Exhibit No. 2, counsel?

[114] Mr. Fisher: Plaintiff's Exhibit No. 2. Those are the locations, yes, sir.

The Court: Can we save time and stipulate that they are owned by the City of Lakewood?

Ms. Newborn: Yes, your Honor.

The Court: All right.

By Mr. Fisher:

Q. So the City does own the street. Could you tell us from what point to what point, going across, that the street is owned by the city? A. In all the diagrams it shows the dimensions of the City's right of way, and I confirmed those as being owned by the City and void of any easements.

Q. So that the Court understands completely, take Clifton Boulevard, and start from the sidewalk and the tree lawn and the street, and going to the other side; what part of that is owned by the City of Lakewood? A. All of it.

Q. Going to Detroit and Madison from the building line, sidewalk, tree lawn, street, tree lawn, sidewalk, and building line; to what extent is that owned by the City of Lakewood? A. Without naming a specific site, I would say in general all of it.

Q. Okay. [115] Calling your attention to Exhibit Double C, you don't have the exhibits there. Do you have those diagrams prepared? A. Yes.

Q. And could you tell the Court the purpose of their preparation? A. The intent was to provide enough detail in order to determine the feasibility of locating newspaper dispensing devices in accordance with the dimensions, the dimension criteria outlined in the applicable ordinance.

Q. I call your attention to what is marked as Joint Exhibit No. 4, and ask you to review that and see if that is the applicable ordinance you are talking about. A. Yes, it is; however, I recall an amendment to this ordinance that revised two of the dimensions, and my question would be, is this the amended ordinance?

Q. That should be the composite that was stipulated with the amendment. A. Then this is what I am referring to, then.

Q. Okay. Do you draw any conclusions as to whether the boxes could be placed at this site shown in your diagram? [116] A. Yes. My conclusion is that all of the proposed sites can have the device located there.

Q. And the diagrams you are referring to are Exhibit Double C; is that right? A. That is correct.

Q. Those diagrams are of the sites on Madison and Detroit only; is that correct? A. That is correct.

Q. And this is the area where the width of the sidewalk and the street line from the building line to the street is the smallest; is that correct? A. That is correct.

Q. And now on Clifton Boulevard would you describe to the Court the size of the sidewalk and tree lawn, what the dimensions are in general. A. In general I recollect a distance from the inside face of the curb to the property line, approximately 22 to 23 feet.

Q. So it is a much greater distance. Could you tell the Court what the average distance from the building line to the curb along Detroit and Madison is? A. Well, approximately 10 to 14 feet.

Q. Would it be fair to say that you would conclude that these dispensing devices, that the requirements [117] could be met along Clifton Boulevard at all the sites requested? A. Yes.

Q. And did you form the same conclusion with respect to the sites requested along Detroit and Madison? A. Yes.

Q. And that is with regard to every requirement? A. The dimensional requirements, yes.

Q. Now, in looking at the dimensional requirements, and in particular the requirement of having the—excuse me a minute, your Honor. These have not been objected to—and you found those dimensional requirements to be reasonable; is that correct? A. In my opinion.

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Did you form an opinion as to whether these dimensional requirements were reasonable?

Ms. Newborn: Objection.

The Court: Sustained again.

Mr. Fisher: All right.

Q. There is a requirement in there that these devices be at least 18 inches from the curb. Are you familiar with that requirement? [118] A. Yes, I am.

Q. And can you explain to the Court the purpose for that?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: All right. No further questions.

CROSS EXAMINATION

By Ms. Newborn:

Q. Mr. Connors, you mentioned in your testimony that you were aware there had been an amendment to Section 901.18? A. Yes.

Q. At the time the ordinance was originally drafted nobody consulted with you in regard to the dimensional requirements; is that correct? A. That is correct.

Q. What is the speed limit on Clifton Boulevard? A. I believe it is 35 miles per hour.

Q. And are you familiar with this map that has been marked Plaintiff's Exhibit 38? A. Yes, I am.

Q. Is this something that you used? A. This is a map published by the Northeast Ohio [119] Areawide Coordinating Agency, and it is for the purposes of delineating funding for state routes and interstates and county roads.

Q. This map shows state routes, county routes, and interstates? A. That is correct.

Q. Looking at this map, can you tell me if Clifton Boulevard has a State Route number?

Mr. Fisher: I object. We are not contesting that it is a state route. We will stipulate that it is.

The Court: Very good.

By Ms. Newborn:

Q. Is it also a county route? A. No.

Q. Is it an interstate route? A. Yes.

Q. Mr. Connors, you have no responsibility with regard to the placement of bus shelters or telephone booths; is that right? A. That is correct.

Ms. Newborn: No further questions.

[120] CROSS EXAMINATION

By Mr. Nelson:

Q. Just so the record is clear, Mr. Connors, you testified that the dimensions of the requirements of the Lakewood ordinance could be met on Clifton Boulevard, did you not? A. Yes.

Mr. Fisher: I interpose an objection to the cross examination for the reasons stated at the beginning of the case.

The Court: Overruled. You may answer.

A. That is correct.

Q. You didn't mean to suggest by that testimony that the ordinance permits news boxes to be placed on public property on Clifton Boulevard, did you? A. There was no mention of the suggestion whatsoever. It was just a statement that in accordance with the dimensional requirements, it is feasible to locate such.

Q. In fact, the ordinance prohibits news boxes anywhere on Clifton Boulevard, does it not? A. Yes, it does.

Mr. Nelson: Thank you. Nothing further.

The Court: Anything else?

Mr. Fisher: Yes.

[121] REDIRECT EXAMINATION

By Mr. Fisher:

Q. On cross-examination you were asked the question about designation of a State route and funding.

The Court: I don't recall funding, but I recall he testified on direct examination—maybe he said—well, go ahead. I am sorry. Proceed.

Q. What kind of funding were you talking about?

A. I was referring to the intent of the map that was displayed to me, and the intent was to delineate funding for major arteries, and it happens that the map also states the interstate numbers and state route numbers and county routes.

Q. Is that funding for repairs or what is the purpose?

A. Yes. That is funding for rehabilitation and reconstruction and repairs, yes.

Q. Something that you could apply for? A. That is correct.

Mr. Fisher: No further questions.

Ms. Newborn: Nothing further.

The Court: You may step down. Call your next witness.

[122] GLENN P. WALKER, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name, please. A. Glenn P. Walker.

Q. And your address, Mr. Walker? A. 1250 Nicholson Avenue, Lakewood, Ohio.

Q. How long have you lived there? A. 12 years.

Q. And you have a position with the City of Lakewood? A. Yes, I do.

Q. Tell the Court what it is. A. Captain with the Lakewood Police Department.

Q. And how long have you had that position? A. Approximately 22-1/2 years.

Q. Is that as an officer, the total? A. Yes.

Q. How long have you been Captain? A. Approximately four years.

Q. Captain Walker, there were photographs taken by the police department which are in front of you with their listings. [123] Would you examine Exhibit A.

Mr. Fisher: Your Honor, there is a stipulation that his testimony is to routinely go through these and identify them as being fair and accurate representations.

Ms. Newborn: No objections.

Mr. Fisher: It is stipulated that if the witness were to testify, he would identify Exhibits A through Q, photographs, to be accurate representations of what they purport to show as listed in the defendant's list of exhibits which happen to be the sites where the news boxes are being requested. Do you have a problem?

Ms. Newborn: No problem. I would like to see—at some point I would like to see the originals; however, I will rely upon the representation of counsel, and I so stipulate.

The Court: I was going to suggest—I can't see too much in the first one that I have. Is that my copy?

Mr. Fisher: The copy that the witness has would be submitted to the Court. These are exhibits, and they go to the Court.

The Court: All right.

[124] By Mr. Fisher:

Q. Would you put those aside for the moment, Captain Walker, and I would ask you to examine Exhibit Double A. A. (The witness complies.)

Q. Have you reviewed Double A? A. Yes, I have.

Q. Would you indicate to the Court what Exhibit Double A shows? A. Exhibit Double A shows various locations within the City and two locations that border the City where the stores or restaurants or motels are open 24 hours a day and do sell newspapers.

Q. Did you total how many of these sites there were? A. There are 11 locations within the City of Lakewood and two that border the city.

Q. Would you confirm—did you confirm whether or not The Plain Dealer is on sale at these sites? A. Yes.

Q. Is it? A. Yes, it is on sale.

Q. Calling your attention to the telephones that are located at various points on the right of way, especially on Clifton Boulevard, and I would ask if you would indicate to the Court the purpose of the installation of those telephones. [125] A. The telephones were put there by the request of the City to people in the area that may have emergency business that would want to contact the City, and they can use these phones.

Q. Could you tell what would be the procedure if you wanted to call the police from one of those phones?

A. You dial the operator and tell the operator that you have an emergency and you want to contact either the police or fire department, and she would put the call through.

Q. Do you have to put in coins in the telephone? A. No, sir.

Q. Calling your attention to Clifton Boulevard and I would ask you, would you tell the Court how many lanes

that Clifton Boulevard has? A. Clifton Boulevard has six lanes.

Q. Okay. Are there any special regulations on Clifton Boulevard in the morning? A. Yes, sir. There is a rush hour parking prohibition on Clifton Boulevard in the morning from 7:00 o'clock to 9:30, no stopping or parking permitted on the south side of Clifton.

Q. That is for west to east traffic going downtown; is that correct? [126] A. That is correct.

Q. Now, there are buses that go along and stop; is that correct? A. That is correct.

Q. Could you indicate to the Court any special problems that have occurred with the people stopping in those lanes in the morning during the rush hour? A. We do have problems where vehicles do stop, and it creates additional congestion; and also we have had quite a few rear end type accidents where cars are stopped in these lanes.

Q. Now, have you had occasion to notice the use of coin operated newspaper dispensing devices for purchases? A. Yes, I have.

Q. Could you indicate to the Court if you have seen any practice with respecting cars and traffic patterns of cars where people use these devices?

Ms. Newborn: Objection.

The Court: Well, I don't think you laid the foundation yet, counsel, for him to testify to it. Is that what your objection is?

Ms. Newborn: Yes, your Honor.

Q. Have you seen an individual using an automobile, have you seen him attempt to use a newspaper dispensing [127] device for the purchase of a paper?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: Excuse me a moment.

By Mr. Fisher:

Q. Did you have occasion to make observations of what is going on along West 117th and the perimeter of the city? A. Yes.

Q. Are there coin-operated newspaper dispensing devices there? A. Yes.

Q. What if any practices have you observed in your routine observations of the use of these with respect to vehicular traffic?

Ms. Newborn: Objection.

The Court: Overruled.

A. I have seen vehicles pull up and stop and passengers get out and buy a newspaper and get back in the vehicle and the driver gets out and goes over to purchase the newspaper and gets back into the vehicle and then leaves.

Q. Now, with respect to the placement of newspaper dispensing devices along Clifton Boulevard, with your familiarity of the vehicles there, do you foresee any [128] particular problems by having these devices installed along Clifton Boulevard?

Ms. Newborn: Objection.

The Court: Overruled.

A. There could be problems with sight obstructions—at various locations and with vehicles stopping in the morning, especially to purchase newspapers which would create congestion and problems with accidents.

Q. Now, with respect to the rental of other city property such as for parking, are you familiar with the practices of the City in that regard? A. With the placement of parking meters, yes.

Q. The question I have is, with respect to enforcement with regard to a truck that might be owned by a newspaper company; is there any particular set policy? A. No, sir.

Q. And what is the general policy of the city with regard to use of the parking spaces by the city? A. If the vehicle is not being used at the present time for loading or unloading, and if it would be parked in a no parking zone or a metered spot, without putting money in, the vehicle could receive a parking citation.

Q. Now, with respect to—there are a couple of hotels on Clifton Boulevard, aren't there? [129] A. There is the Clifton Manor Motel which fronts off of Lake Boulevard but it runs through to Clifton, and there is the Yorktown Motel which fronts on Clifton Boulevard.

Q. And you have them listed in Exhibit Double A as being places where you buy newspapers all night? A. That is right.

Q. Have you been in there to see this happen? A. Yes, I have.

Q. Calling your attention to Madison and Detroit and the placement of newspaper dispensing devices, and the question is, would you foresee any difficulties based upon your familiarity with the regulations along these streets? A. Not that I could see at this time, no.

Mr. Fisher: No further questions.

CROSS EXAMINATION

By Ms. Newborn:

Q. Captain Walker, prior to the passage of 901.18 of the Lakewood ordinance, no one consulted with you in regard to the installation of the newspaper vending devices; is that correct? A. That is correct.

Q. And you have not done any analysis concerning the [130] safety of newspaper vending devices; is that correct? A. That is correct.

Q. Detroit is actually a higher accident area than Clifton; is that correct? A. Yes, it is.

Q. And there is heavy rush hour traffic on Clifton; is that correct? A. That is correct.

Ms. Newborn: That is all, your Honor.

CROSS EXAMINATION

By Mr. Nelson:

Q. Captain, would I be correct in assuming that the various locations identified in Exhibit AA, places where newspapers could be purchased, are not owned or controlled by the City of Lakewood? A. I missed the first part of your question.

Q. I am directing your attention, sir, to Exhibit AA, which I think contains a list of commercial establishments in which it is possible to purchase newspapers; am I correct in that? A. That is correct.

Q. The City of Lakewood doesn't own or control those locations, does it? A. No, it does not.

[131] Q. You can't tell the people who do own and control those locations whether or not they shall offer newspapers for sale? A. No.

Q. You don't know, do you, whether The New York Times in fact is offered for sale at all those locations? A. No, sir.

Q. Clifton Boulevard continues from Lakewood into the City of Cleveland proper, does it not? A. Yes.

Q. There are news boxes along Clifton Boulevard in the City of Cleveland, are there not? A. Yes.

Q. Are you aware of any particular problems that the presence of those news boxes along Clifton Boulevard has caused in Cleveland? A. The only problem—

Mr. Fisher: Objection, unless it is established that he observed—that he made the observations.

The Court: Sustained.

By Mr. Nelson:

Q. Have you personally observed traffic on Clifton Boulevard in the City of Cleveland? [132] A. Yes, I have.

Q. During the rush hour? A. Yes.

Q. Have you personally observed any problems caused by the presence of news boxes there? A. Yes, I have.

Q. What do those problems consist of? A. I observed vehicles pulling up and stopping with the driver getting out and opening his door and causing other traffic to swerve and traffic to back up behind while he goes over to purchase a newspaper and come back into the vehicle.

Q. Was this in violation of a no stopping ordinance? A. Yes.

Q. How many times did you see this? A. At least six times.

Q. When? A. Within the last two months.

Mr. Nelson: No further questions.

The Court: Anything else?

Mr. Fisher: No further questions.

The Court: You may step down. Call your next witness.

[133] ERIC LANE, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name, please. A. Eric Lane.

Q. What is your address, Mr. Lane? A. 15416 Lake Avenue.

Q. How long have you resided there? A. 20 years.

Q. Did you have a position with the City of Lakewood during this time? A. I did.

Q. Tell the Court what that position was. A. Planning Director, Secretary to the Board of Zoning Appeals.

Q. How long have you had the position of Planning Director? A. 20 years.

Q. How long have you held the position of Secretary to the Board of Zoning Appeals? A. The same time.

Q. Prior to that tell the Court what your occupation [134] was. A. I was Planning Director for the City of Charleston, West Virginia, and Planning Director for the Regional Planning Commission in Sharon, Pennsylvania.

Q. And prior to that, your occupation? A. I worked for the City of Ottawa, Canada.

Q. Prior to that? A. School.

Q. And tell the Court what degrees that you have. A. I have a Master's in city planning and a Bachelor's Degree in agriculture.

Q. What year did you graduate? A. In 1954.

Q. Now, in connection with this case, did you have occasion to survey the city to see where there might be a coin operated newspaper dispensing device installed? A. I did.

Q. I call your attention to Exhibit BB in front of you, and I ask if you would review that exhibit. A. These are locations where I noticed these boxes had been placed.

Q. And would these be in situations where the newspaper could be purchased all night if there were newspapers in the boxes? [135] A. Yes.

Q. Did you happen to take any photographs of those sites? A. I did.

Q. Calling your attention to Defendant's Exhibit R through Y, would you look at them.

Ms. Newborn: I am wondering if I may have the opportunity to see those? I only have seen Xeroxes.

The Court: Show them to counsel.
(After an interval.)

By Mr. Fisher:

Q. Have you had occasion to review those exhibits?

A. Yes.

Q. I am talking about Exhibits R through Y. A. Yes.

Q. Are these photographs of the sites that you have listed in Exhibit BB? A. Yes.

Mr. Fisher: If I can get a stipulation, I believe he will testify that those are fair and accurate representations of what he photographed as indicated in our list of exhibits, and I will go through them routinely.

Ms. Newborn: We will stipulate them.

[136] Mr. Fisher: If she would stipulate the testimony that they are fair and accurate representations of the sites—

The Court: That is what she said.

Mr. Fisher: Okay. I will dispense going through them one by one then.

By Mr. Fisher:

Q. All right. Calling your attention to Exhibit AA, and I would ask you to examine that. A. Double A?

Q. Exhibit Double A is in front of you. A. Oh, excuse me.

Q. Was that information furnished to you? A. Yes, it was.

Q. Calling your attention to Plaintiff's Exhibit 2, a listing of potential sites for Plain Dealer news dispensing

boxes, and ask if that data was called to your attention?

A. Yes, it was.

Q. Calling your attention to Exhibit CC—excuse me—DD. Would you examine that. A. Yes.

Q. Did you examine that? A. Yes. This is a map I prepared.

[137] Q. In your preparation of this map, would you indicate to the Court what you have shown. A. I showed the location of the existing boxes, their location and the proposed location of boxes by The Plain Dealer, and the location where the papers can be purchased inside buildings.

Q. Would it be fair to say that you have delineated the sites where you can already buy newspapers, either through a coin-operated box or an all-night business with the green color? A. Yes.

Q. Would it be fair to say that the sites where The Plain Dealer requested locations are outlined in the red color? A. Yes.

Q. Now, with respect to the sites in green, you say you lived on Lake Avenue? A. Yes.

Q. Are you familiar with the walking distances in the City of Lakewood? A. Yes.

Q. Is that part of your determination as Planning Director? A. Yes.

Q. Could you indicate to the Court if the sites in [138] the green color are within walking distance to every person in the City of Lakewood?

Ms. Newborn: Objection.

The Court: I will sustain that.

By Mr. Fisher:

Q. Do you have an opinion as to whether or not the sites circled in green, taking them all as they are lo-

cated, whether there would be one within walking distance to every person located in the City of Lakewood?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. With respect to persons living along Lake and Clifton Boulevard, do you have an opinion as to the distance from those spots to Detroit Avenue? A. What spots?

Mr. Fisher: Where these newspaper dispensing devices are located or the stores.

The Court: On what streets?

Mr. Fisher: They are located on Detroit, your Honor.

The Court: And your question is, the items that are marked in green, what distance they are from where?—

[139] Mr. Fisher: From Lake or from Clifton Boulevard.

The Court: —Do you want to take each spot as you come to it from left to the right on the exhibit?

Mr. Fisher: Okay.

By Mr. Fisher:

Q. Let's take West Clifton Boulevard. Could you indicate to the Court the distance from Clifton Boulevard to Detroit? A. About a quarter of a mile.

Q. Whereabouts is it that you live on Lake Avenue? A. I live at the corner of Sylvan and Lake, the north side of the street.

Q. Do you have occasion to walk to Detroit Avenue? A. I go up there often to mail letters at the post office, which is on Detroit and Warren Road.

Q. Do you have occasions to do any shopping on Detroit Avenue? A. Yes.

Q. And do you have occasion when you walk there for those purposes— A. I don't usually walk to Detroit to do shopping. We go in the car.

Q. Do you know of other people who have occasion to [140] walk to Detroit for the purchase of newspapers or anything like that?

Ms. Newborn: Objection, your Honor.

The Court: Sustained.

By Mr. Fisher:

Q. Have you had occasion to walk to Clifton to look at magazines or purchase a newspaper? A. Yes.

Q. Could you describe to the Court approximately how far a distance that is for you to walk? A. A little more than a quarter of a mile.

Q. How often do you make such a walk? A. It would be difficult to say how many times I do it.

Q. How many times a week would you do this? A. I wouldn't say I do it every week.

Q. You don't do it every week? A. No.

Q. Would you describe to the Court the difficulty of the walk to you.

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Looking at the map, do you find any sites that are further than a quarter of a mile from the newspaper [141] dispensing device? A. I would say there are none. There are none.

Q. That are about a quarter of a mile? A. Yes.

Q. These sites that you located where the newspaper dispensing devices are located, can they be viewed from the street as you drive by? A. Yes.

Q. Next I am asking you to examine what is marked as Exhibit Z of the defendant's exhibits. Would you look at that, please? A. (The witness complies.)

Q. Could you identify Exhibit Z? A. This is an existing zoning ordinance for the City of Lakewood.

Q. This is a copy of what is adopted by the Council of the City of Lakewood? A. Yes.

Q. Is there a zoning map there? A. There is.

Q. Is that at the front of the book? A. Yes.

Q. And is it color coded? A. Yes, it is.

Q. Calling your attention to Clifton Boulevard, and [142] asking you this question:

Could you tell the court what zoning use districts Clifton Boulevard is located in? A. It is in the EM2B1 and BM2 and B-1 and R-2.

The Court: You said "B"? You said "B" for the first one?

The Witness: M-2, and then B-1. That is the corner.

The Court: All right.

The Witness: R-2 and M-1.

By Mr. Fisher:

Q. Now, these are color coded; is that correct? A. Correct.

Q. Now, could you explain to the Court—did you say R-1 was at the one end? Starting from the west end of the downtown, what is the zoning on Clifton Boulevard? A. It is R-2, and on the north side it is R-1.

Q. That is—you mean 2 West Clifton Boulevard? A. West Clifton to Webb.

Q. All right. Would you explain to the Court what that designation R-1 and R-2 means. A. R-1 is the single family, and R-2 is the one and two family.

[143] Q. How far do you have to go until you get to a change in that classification? A. To Virginia, where a change is to M-1.

Q. Tell the Court approximately the distance. A. About a mile.

Q. And could you explain to the Court what M-1 relates to? A. M-1 is apartment houses.

Q. And then what follows after you get through the M-1 district? A. You are back to R-2.

Q. How far does that go before it changes again? A. It changes at Bell, and then all the way down to Cove where it changes to M-2.

Q. Tell the Court the distance from M-1 to Cove. A. That is a little more than a mile.

Q. And then from Cove on east to the city line, could you describe that to the Court. A. That is M-2, with the exception of two corners at Hird which is B-1.

Q. And what is M-2? A. M-2 is multiple family.

Q. What is the difference between M-1 and M-2 use district? A. A higher density.

[144] Q. More high rises? A. Right. The M-1 requires more land space per dwelling unit than the M-2.

Q. Referring to the zoning code and the R-2 designation, could you indicate to the Court what uses are permitted in that district? A. Single and two-family.

Q. Anything else permitted? A. That is all.

Q. Could you refer the Court to the section that describes that? A. Page 11.

Q. And could you read that for the Court, exactly what it says. A. "Permitted uses, single and two-family."

Q. Going to the next designation of the M-1. Read to the Court what is permitted in that district and report to the section number. A. 1109.02, "Permitted principal use, M-1 district—

The Court: I am trying to be patient and there hasn't been an objection, but I don't understand the purpose of these questions. The zoning code speaks for itself.

Mr. Fisher: Very well.

The Court: It speaks for itself.

[145] Mr. Fisher: All right.

By Mr. Fisher:

Q. Going back to the zoning map, could you describe the areas where commercial uses may be done in the City of Lakewood. A. Commercial is on the entire length of Detroit and Madison Avenue and a section between Hilliard and Franklin on Detroit and Warren Road.

Q. And the site that you mentioned on Clifton Boulevard as well; is that correct? A. The B-1 is on Clifton at two locations, just the two corners.

Q. So that the commercial uses are permitted in all those areas you just described? A. Correct.

Q. And are there industrial areas as well? A. There is a long area on 117th Street abutting the railroad tracks.

Q. All right. Before we get to the streets of Madison and Detroit, could you tell the Court what their location is with respect to the City? A. Madison is probably on the south one third or less of the City from one end to the other, from east to west.

[146] Q. And Detroit is located where? A. Across the middle of the city from 117th Street to Riverside or Sloan Avenue.

Mr. Fisher: No further questions.

CROSS EXAMINATION

By Ms. Newborn:

Q. Mr. Lane, you are the City Planning Director?

A. Yes.

Q. You currently hold that position? A. No.

Q. You really are retired? A. Yes.

Q. You held that position for 20 years? A. Yes.

Q. As Planning Director, you are involved in the administration of the zoning code? A. Yes.

Q. Prior to the passage of 901.181 did anyone consult with you regarding the installation of newspaper vending machines along the streets of the City of Lakewood? A. No.

Q. Clifton Boulevard is a very busy street; is that correct? [147] A. Correct.

Q. And it has heavy rush hour traffic? A. Correct.

Q. And there is bus traffic? A. Right.

Q. And there are bus shelters there; is that correct? A. Right.

Q. Would it be correct to say that the City Zoning Plan has nothing to do with where bus shelters are placed on the City's right of way? A. Correct.

Q. And the City Zoning Plan has nothing to do with where telephone booths are placed on the right of way? A. Well, they have been before the Board of Zoning Appeals on a number of occasions for permission to locate them.

Q. If telephone booths are going to be erected on the public property, does the Planning Department get involved? A. No, they have not.

Q. Is there any provision in the Lakewood Zoning Code in regard to newspaper vending machines? A. No, other than that under the section on the ordinance in reference to what is permitted. [148] Those things that are not permitted are not only those things that are listed as sub-

mitted and are—I am getting mixed up here—the Section states that only those uses as listed are permitted, and others are prohibited.

Q. And there is nowhere in the zoning code that newspaper vending machines are listed? A. Right; therefore, they were prohibited.

Ms. Newborn: No further questions.

Mr. Nelson: No questions.

The Court: Anything else?

Mr. Fisher: Yes.

RE-DIRECT EXAMINATION

By Mr. Fisher:

Q. You photographed newspaper dispensing devices as being used in certain areas of the city; is that correct?

A. Yes.

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: All right.

Q. Upon cross-examination, you were asked the question whether or not newspaper vending devices are prohibited. The question I have is, is that throughout [149] the entire city? A. Except for in the—I would say in the BR districts, that they would be permitted.

Q. How about the B-1 district?

Ms. Newborn: Objection.

The Court: Well, I will overrule it.

A. I would say that they are not permitted in the B-1 districts.

Q. Is there a provision for variances? A. There are.

Mr. Fisher: One minute, your Honor.

(After an interval.)

Mr. Fisher: No further questions, your Honor.

Ms. Newborn: I have no further questions.

Mr. Nelson: Nothing further.

The Court: Just one thing: You said that newspaper dispensing machines are not permitted in any one-family districts?

The Witness: Could I have the question again?

The Court: I take it that your opinion is that newspaper vending devices are not allowed in one-family districts?

The Witness: Correct.

[150] The Court: I think the question has been asked, but I will ask it again: Are bus shelters allowed in one-family districts?

The Witness: They are. The ordinance per se does not mention bus shelters, but they are there as a public service.

The Court: Where do you find that in the ordinance, or is that just your opinion?

The Witness: They have been there since the beginning of the transit system; therefore, you might even say they are non-conforming.

The Court: Well, if I wanted to put up another bus shelter, could I put it up under that zoning ordinance, or do I have to come through you to get an exception?

The Witness: I think you would have to go to the Board of Appeals.

The Court: All right. I have no other questions.

Ms. Newborn: Nothing.

Mr. Fisher: Just one question.

[151] RE-DIRECT EXAMINATION

By Mr. Fisher:

Q. Are you familiar with the zoning code prior to the adoption of the 1973 zoning code? A. Yes.

Q. Do you recall what if anything was stated about bus shelters and stations or transit stations? A. I can't recall that off of my cuff.

Q. But you recall that these things have been for some time—since the bus stations were in operation, since the street cars were in operation on Clifton? A. They have always had them.

Mr. Fisher: One minute, please, your Honor
(After an interval.)

Mr. Fisher: I have no further questions.

The Court: Let me ask you another question:
What about trash cans?

The Witness: The City does provide receptacles on the litter bases.

The Court: My question is, are they permitted?

The Witness: They are not permitted by other than the city. The city has a backyard collection, [152] so you can't have trash cans.

The Court: But the City can?

The Witness: The City can.

The Court: I have nothing further. Anybody else have a question?

Ms. Newborn: No.

Mr. Fisher: No.

The Court: Having been a former Councilman, I ask you these questions.

Let's take a break. We have been going very strong.

(Short recess had.)

[153] FRANK ZIEGENRUECKER, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name, please. A. Frank Ziegenruecker.

Q. And what is your address? A. 14914 Lake Avenue, Lakewood, Ohio.

Q. How long have you lived at that address? A. Two years.

Q. How long have you been associated as a resident of the City of Lakewood? A. Just about all my life.

Q. So you lived at various places in the City of Lakewood? A. And for a short time outside of the city.

Q. You are presently employed by the City of Lakewood? A. Yes, I am.

Q. And in what position? A. Superintendent of Streets.

Q. How long have you had that position? [154] A. Three years this June.

Q. And prior to that, what was your position? A. I was a supervisor in the Division of Streets.

Q. How long were you on that job? A. Well, for five years as a supervisor.

Q. And prior to that what work did you have? A. I did most anything that came along. I operated equipment and worked the vehicles in the Maintenance Division Department.

Q. How long were you on that position? A. About four or five years.

Q. Tell us your educational background. A. I attended Lakewood High School, and I graduated, and I went to Cleveland States University.

Q. Did you secure your degree? A. No.

Q. What sort of a course did you take? A. Sociology, a major in sociology.

Q. Now, in your position, your present position, do you have occasion to receive complaints about accidents, injuries, and that type of thing on the public right of way?

A. Yes, I do.

Q. Could you tell the Court approximately how many calls that you have on a daily basis as to someone [155] calling or car accidents on the public right of way? A. I would say we average four reports a day.

Q. Could you indicate to the Court how you would classify the types of calls that you get. A. Well, they would be anything from people tripping and falling on sidewalks to cars running off the roadway and striking objects.

Q. Do you have any calls with respect to somebody walking into something on the public right of way? A. Yes.

Q. What kind of cases are those? A. That could involve anything from a person to a bicycle striking an object such as a mailbox or utility pole, or a person just tripping on a sidewalk and falling against an object, or a person simply walking around the corner and walking into a traffic control device.

Q. What do you mean by that? A. If you notice in most cities you will find yellow boxes hanging on utility poles, yellow or silver, that control the operation of the traffic lights.

Q. Have you had occasions where this has happened? A. As a matter of fact, we had one happen on the 9th, I believe, is the latest one.

Q. Now, with respect to people injuring themselves [156] on mailboxes, what if anything do you do about

that? A. Well, we simply refer to the Post Office Department at that time, at that point.

Q. Do you have any control of the location of the mailboxes on the public right of way? A. We have asked the Postal Service to relocate the mailboxes that we consider to be a hazard or in the line of sight at an intersection.

Q. What do you mean by "in the line of sight"? A. Too close to the corner, and people complained in attempting to pull out on the main street that the mailbox restricted their view onto the main street while driving a car.

Q. Did you do a particular survey as to the accidents involving a vehicle in the right of way? A. Yes, we did.

Q. Do you have the information of that survey at hand? A. I am familiar with the numbers.

Q. Tell the Court the number of accidents that occurred in the public right of way in 1983? A. Well, the number I have is that we had 153 vehicles run off the road in 1983 and strike various objects.

Q. And did your survey classify the types of things that were hit over a three-year period? [157] A. Yes, we did.

Q. And could you tell the Court what numbers you had and in what categories. A. Well, we have had telephone booths and appliances struck, and utility poles, mailboxes, and traffic signal devices, and poles and signposts, and stop signs.

Q. Are you responsible for maintaining the public right of way, the tree lawn and sidewalk area in a safe condition? A. Yes. My job with the City is to maintain the right of way in a safe condition.

Q. Aside from getting these complaints, what do you do in that regard? A. After we receive a complaint, in

addition to looking for a defect through inspection, we would act on each complaint individually, and we go out and inspect it, and if there is something wrong, or if there is something that can be done to improve the situation, we do it immediately.

Q. What kind of things do you find you consider to be wrong that should be corrected? A. Perhaps holes in sidewalks, or broken curbs. There might be situations where a traffic control device box is within a crosswalk area at a corner that may have to be moved; and anything of that nature.

[158] Q. Anything that appears would be in the line of people hitting it? A. That is correct.

Q. Of what importance is how something is anchored down in the tree lawn and sidewalk area? A. Every object that we have there now is anchored down to some degree or another.

Q. What is the importance of having it anchored down in a certain manner? A. If it should happen to be struck, it does not become a missile or projectile and not go flying in the air and hit a pedestrian or other property.

Q. Now, you indicated that you had the numbers memorized, and you gave me a report on this? A. Yes. I don't know if I have them memorized exactly. I gave you a report.

Q. Would you like to look at your report? A. All right.

Q. Could you indicate to the Court the number of objects hit over a three-year period? A. Total objects hit over a three-year period, actually two years and three months, was 65.

Q. 65 in two years and three months? A. Yes. That is what the Division of Streets would keep records for.

[159] Q. Can you indicate the categories that you have and how many of these objects were hit, how many times that type of object was hit? A. Okay. We had guard rails to various parts of the city, so to date we had 10 instances of these being hit, and then one mailbox in 1983, and 17 parking meters, 15 signposts, two signal poles, and one telephone booth, four trees, and one utility pole.

Q. You didn't mention the number of fire plugs. A. It is on here—we have no record here; however, that is information that is incomplete. That information is kept by the Water Department.

Q. In these instances were any of these situations involving a missile effect, as you call it? A. That I did not get into specifically.

Q. Okay. Do you have an opinion as to whether any other items should be placed in the public right of way than are already there? A. My opinion is that we place nothing there except what is necessary.

Ms. Newborn: Objection.

The Court: I will sustain it.

Q. Do you have an opinion as to whether the frequency [160] of the items being hit would increase if more items were placed in the public right of way along the streets in the tree lawn area?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. In your work and recollection of what occurs on a day-to-day basis, could you indicate to the Court how frequently you get calls about someone walking into something on the public right of way or tripping and hitting it? A. We get reports of the people tripping and falling down on a daily basis, if that is what you mean.

Q. Going beyond that, the question was, what frequency do you get calls about somebody not only falling but hitting some item like a pole or fireplug or parking meter? A. I would say about less than once a month.

Mr. Fisher: Okay. One minute, your Honor.
(After an interval.)

By Mr. Fisher:

Q. Have you had occasion to travel outside of the City of Lakewood and note where coin-operated newspaper dispensing devices are located? [161] A. Yes.

Q. Do you have in mind how these are located on streets outside of the City of Lakewood? A. I noticed them at the street corner toward the street side within the City of Cleveland, at least.

Q. With respect to Detroit and Madison, if these devices were located as you have seen them in other cities, do you have an opinion as to whether or not this would cause a safety hazard in the City of Lakewood? A. In certain areas, yes.

Q. Explain to the Court what types of safety hazards you are talking about.

Ms. Newborn: Objection, your Honor. There is no foundation.

The Court: Sustained.

By Mr. Fisher:

Q. Can you describe to the Court the situations that you feel were dangerous?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: Excuse me a moment, your Honor.
(After an interval.)

Q. You are familiar with Clifton Boulevard and [162] Detroit and Madison, are you not? A. Yes, I am.

Q. With respect to the accidents and frequency of those calls that you get, these calls four times a day, could you tell the Court with respect to these three streets where the most type of reports would come from? A. I would say generally they are fairly evenly distributed.

Q. Evenly distributed? A. Yes.

Mr. Fisher: No further questions.

CROSS EXAMINATION

By Ms. Newborn:

Q. You are the Superintendent of the Department of Streets? A. Yes.

Q. And you have held the position a number of years? A. Yes.

Q. And in that regard you have some responsibility for the safety on the right of way? A. Yes.

Q. Prior to the passage of Ordinance 901.181, the codified ordinance of the City of Lakewood, did anyone [163] consult with you regarding the safety of vending machines in the right of way along the streets? A. No.

Q. Have you done any studies on the safety of the newspaper vending machines on the right of way? A. No, I haven't.

Ms. Newborn: Nothing further.

Mr. Nelson: No questions.

The Court: Anything further?

Mr. Fisher: No, your Honor.

The Court: You may step down. We will recess until tomorrow morning at 9:30.

(Court adjourned for the day.)

[164] APRIL 12, 1984; 9:30 O'CLOCK A.M.

The Court: Good morning. Call your next witness.

Mr. Fisher: We call Mr. D. W. Hartt.

Before we proceed, I would like to point out that there was one correction made in Joint Exhibit 4—I should say two corrections:

A comma was inserted in the first page after the section done in red, and the second page, the number was 250 in words and No. 25, which was corrected in red on the copies down here (indicating).

This was done with the approval of counsel for the plaintiff. It was an oversight. I already had provided her with a corrected copy which she has, but mine was not.

The Court: May I see what you are talking about?

Ms. Newborn: We have the joint exhibits in the back of our binder, and they are correct.

The Court: All right.

Mr. Fisher: It is just a couple of typographical errors, it should be 250.

[165] DAVID W. HARTT, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. State your name, please. A. David Hartt; H-a-r-t-t.

Q. Where do you reside, Mr. Hartt? A. 3296 Braemar Road, Shaker Heights.

Q. What is your present occupation? A. I have my own planning and consulting business, and I have had that for the last five years.

Q. In front of you are the exhibits, and referring to Defendant's Exhibit FF. A. Yes.

Q. That is a statement of your qualifications? A. Yes, it is.

Q. Is that an accurate statement? A. Yes, it is, except that the 14 years has expanded to about 70.

Q. Okay. You have what degrees, Mr. Hartt? A. A Bachelor of Architecture and a Master of City Planning, both from the University of Michigan.

[166] Q. Could you explain to the Court what familiarity you have with the City of Lakewood? A. Well, I have been involved with the City in a couple of matters prior to this matter, and I have gotten myself more familiar with the community as it pertained to doing research and background information for this particular case.

Q. And what years did you do work for the City of Lakewood previously? A. The firm I was with was doing the work for the City back in 1977 or 1978, and I was involved in the project to some degree, but I was not the principal in the firm that was doing most of the work for the City. And then I was involved a couple of years ago in another court case for the City of Lakewood.

Q. In your representations, do you represent developers as well as political bodies? A. Yes, I do.

Q. Now, with respect to this case, what did you do? A. Well, I did substantial amounts of land use work in touring the city and becoming more familiar than I did in the past with the land use characteristics, and I further reviewed the zoning code and also the ordinances pertaining to newspaper dispensers for the [167] City of Lakewood, and I looked at the practices in other communities as to how newspaper dispensers are being placed on both public and private property.

Q. Did you do any literature research? A. Yes, to some extent, and I looked to see if I could find any articles or documents that indicated how these devices were regulated, how the concerns the people had regarding their placement.

Q. Would you look at Exhibit II, please, A. Yes.

Q. Could you explain to the Court what that is? A. It is an article that was in the planning magazine of the American Planning Association, and I believe it was the February issue of this year. The March issue of 1984 talks about four issues relating to planning that have emerged on the horizons in recent years that have become contemporary or difficult issues for planners to deal with currently that were not issues to a great extent in the past.

Q. And is one of those issues related to this case?

A. Yes.

Ms. Newborn: Objection to the questions regarding the journal. It is not a learned treatise, and it is hearsay, and we should not hear testimony about it.

[168] The Court: Well, I will overrule your objection at this time. It has not been offered at this time for anything. He just identified them as far as I am concerned at this time.

By Mr. Fisher:

Q. And with regard to the subject matter of this case, is there any statement of problems that are created by the current use of these devices? A. The article generally recognizes that the current proliferation of newspaper boxes is causing some definite headaches and—

Ms. Newborn: Objection.

The Court: I will sustain that. The article speaks for itself.

By Mr. Fisher:

Q. Now, in connection with your survey in the surrounding areas, would you take a look at Exhibit GG, please. A. Yes.

Q. Do you have a cover page identifying certain photographs and some photographs? A. I assume the photographs are in the envelope, yes.

Q. Did you take these photographs yourself? A. Yes, I did.

Q. Examining these, are these fair and accurate [169] representations of what you saw as you took the photographs and as identified in the defendant's exhibit list? A. Yes, they are. These are reasonable examples of practices that are being used in several locations regarding the placement of the dispenser boxes.

Q. In this survey would you explain to the Court using these photographs, what sort of health and safety problems you detected with the current use. A. In general—and I will go over the photographs specifically—but there are quite a number of these boxes that are placed in crosswalks, and they are protruding in the handicapped ramps, and they are attached to poles that are preventing the car door from being open if it is a parked car, and they are near fire hydrants. They are oftentimes right on top of the street, and this is a fairly—from my view of these—this is a fairly common practice as to how these are placed.

Ms. Newborn: Objection, and I move to strike the "fairly common practices," which is no indication of how many.

The Court: Sustained.

By Mr. Fisher:

Q. Taking Exhibit GG-1, the photograph of Mayfield [170] and Green, and explain to the Court what you de-

tected from that observation. A. Well, first of all, the boxes are varying in design and color, and they are virtually on top of the curb with no setback from the traveled vehicular lane. They are attracting quite a bit of clutter underneath the four boxes that are at this location.

Q. Going to Exhibit GG-2, East 185th and Monterey; this one is across a crosswalk, so the pedestrian, as he arrived on the curb on the other side, has to go around this to continue on the sidewalk, and this is also on a new paved area that was recently constructed in the last four or five years for one purpose, to help mark—it was a place where there was a crosswalk from one side of the street to the other.

Q. With respect to GG-3, would you indicate what you detected from this observation? A. The actual box is within an RTA bus shelter, and consequently it is taking up some of the seating area for the riders.

Q. GG-4? A. East 242nd in the apartment driveway.

Q. What do you detect there? A. Well, there are two photographs related to this site. One is the newspaper boxes that are right up [171] to the driveway.

Q. Could you indicate which exhibit that is? A. Well—No. 5.

The Court: GG-5?

The Witness: Yes. GG-5 is taken of the rack from the apartment driveway and looking out on Lake Shore Boulevard, and the box is right on top of the paved area of the driveway. And GG-4, the box, is shown protruding onto the 6-foot wide sidewalk.

By Mr. Fisher:

Q. As to GG-6, can you indicate what you detected from that observation? A. This is on the tree lawn between the RTA bus shelter and the street, and conse-

quently the bus rider has to go around the dispenser to get from the shelter to the bus.

Q. And this is at Lake Shore and East 248th? A. Yes.

Q. Just for the record, would you go down the list of these exhibits, GG, and indicate the location of each. A. GG-1 is the Mayfield and Green. GG-2 is East 185th and Monterey. GG-3 is Lake Shore and East 228th. [172] GG-4 and -5 are Lake Shore and approximately East 242nd, really across from the intersection at East 242nd. GG-6 is Lake Shore and 248th.

Q. Those are the ones that you have testified to so far? A. That is right.

Q. As to GG-7, where is that photograph taken at? A. East 4th and Euclid, downtown.

Q. Is this near the court? A. Yes.

Q. And what did you detect by that observation? A. A general random clutter of four boxes here with no common design and no pattern of how they are placed on the sidewalk, and generally taking up a substantial amount of current sidewalk space.

Q. Are there public facilities in that photograph that are near these? A. There is a fire hydrant behind the two boxes on the right-hand side, and I don't know the exact distance these are from this hydrant.

Q. Do you know what distance is required for the use of a hydrant? A. I think 5 feet is the reasonable distance to allow the equipment to open the hydrant in order to [173] get the hoses from the truck to the hydrant and to the private property on the other side of the sidewalk. I think 5 feet is certainly a minimum distance that should be required.

Q. GG-8, would you tell where that was taken. A. That was taken at East Ninth and Euclid.

Q. What do you detect from that? A. It shows again that the dispenser is in the crosswalk as you go from the crosswalk to the curb.

Q. GG-9, can you tell where that is located and what do you detect? A. This is on East Ninth Street between Euclid and Prospect, and it shows the boxes in this case virtually on top of the fire hydrant. It is a mid-block location.

Q. Including the photographs and your literature survey and your general observations, could you tell the Court any additional features of current use that you detected that are hazardous to health or safety?

Ms. Newborn: Objection, if he is going to base it on the literature.

The Court: Sustained.

By Mr. Fisher:

Q. Are there any other features that you found to be [174] hazardous or detrimental in your opinion? A. I mentioned earlier, I also found them protruding onto the handicap ramps down to the vehicular portion of the ramps. I found them blocking the opening of doors when cars are parked. Those are two additional examples.

Q. All right. Now, did you have occasion to examine the provisions as to fees, insurance indemnification, and cleaning, of the new ordinance of the City of Lakewood called Section 901.181? A. Yes, sir.

Ms. Newborn: Objection.

Mr. Fisher: He is a city planner. He knows how things operate in the city.

The Court: Sustained.

By Mr. Fisher:

Q. Mr. Hartt, in your work do you have occasion to review the arrangements for rental and use of city prop-

erty? A. Well, I am aware of the types of conditions that have to be met by developers or users of property to buy or lease land or develop on property.

Q. Calling your attention to this "Fee, insurance, cleaning, and indemnification" provision, could you [175] indicate to the Court whether in your opinion these are typical? A. Yes, they are.

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Could you indicate as to how those provisions compare with what is customary in the municipal field?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: I wish to proffer.

(Thereupon the following was proffered for the record:)

Mr. Fisher: I would proffer for the record that he would indicate, if allowed to answer, he would indicate those are both typical and customary provisions used for renting or leasing city property for private use.

(Close of proffer.)

By Mr. Fisher:

Q. Mr. Hartt, did you have occasion to look at that distancing and location requirements in the new codified ordinance, 901.181, set forth in Joint [176] Exhibit 4? A. Yes, I have.

Q. Did you draw any conclusions as to the restrictiveness of those provisions?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Mr. Hartt, did you examine these provisions with respect to whether or not they are the least restrictive means for regulating these? A. Yes.

Q. Could you tell the Court your opinion as to whether or not these are the least restrictive means?

Ms. Newborn: Objection.

The Court: Overruled.

A. I think they are certainly the least restrictive, and in my opinion there are certain areas where I think the regulations pertaining to dispenser boxes could be even more restricted.

Q. Could be? A. Should be.

Q. In what regard do you believe they should be more restrictive? A. I think generally the location of these things, there ought to be several things:

[177] (1) I think they ought to be anchored on flat concrete pads which are situated flat on the sidewalk as most other equipment is that is placed in the right of way.

I think if there are going to be more than one box in any one location, that the boxes ought to be placed side by side, and they ought to be placed, wherever at all possible, against a building or on the building side of the sidewalk as opposed to the curb side of the sidewalk.

And I also think that the 250 feet distance requirement is more than reasonable. Each block in Lakewood averages more than 250 feet, so this provision is allowing more than one box per block frontage, and it seems reasonable that maybe one per block face is an adequate spacing requirement.

Q. Could you explain to the Court your reasoning for not having the devices, as permitted, 18 inches from the curb? A. Well, in general you want to keep as

many things as you can from the traveled right of way; and still you recognize that there are certain amenities you want on the right of way to keep it attractive, but generally you want to move things as far from the curb as you can.

[178] Partly that is because if you have the clear distance of 5 feet—you have a much more effective 5-foot distance if you have the vertical obstructions on one side versus on both sides of you, and if you are putting the newspaper boxes on the curb side and maintaining the 5 feet, you may have a building on the private property side, and then you have got a vertical structure on both sides of you which really reduces the effectiveness of the 5-foot clearance.

If you have all the vertical structures on one side, the 5 feet serves a more useful purpose.

Q. I think you testified previously something about blocking parking or getting out of the car when parking. Explain to the Court what you meant by that. A. Well, I have seen where a parking sign was roughly placed 6 inches from the edge of the curb, and the curb was about 6 inches wide; so it was right behind the curb line. This was a sign giving parking instructions, one hour or two hours, whatever.

Chained to the sign was a newspaper box, and this was right in the mid-point between two parking meters, so it was in the place where the car doors are apt to be opened and further restrict the ability to open the car doors.

Q. You mentioned the business about having things on [179] one side and the other side. Does this have any bearing on the traffic on the street? A. Yes.

Q. Tell the Court what that bearing is. A. The more things you have immediately adjacent to the street, of course, you have more things that vehicles can hit.

In addition to that, the more obstructions there are, even on the sidewalk, the slower people are apt to travel on the highway, and also depending on the number of these things, they are apt to pull—the driving habit will be to pull away from the right-hand curb and possibly into the adjacent driving lane.

Q. Is there a common name for this type of planning that is causing this? A. I am not sure of the planning term, but it is sort of a tunnel effect that occurs. People see the barriers in front of them, and they are apt to pull away from them.

Q. With respect to architectural review, are you familiar with the provisions of the Lakewood Architectural Review Code provisions? A. Yes.

Q. Are you aware of the procedure that is involved in the Architectural Review in general? [180] A. Yes.

Q. Could you tell the Court how this procedure compares with Architectural Review in general?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. As an architect, can you indicate to the Court whether this procedure is appropriate for getting proper architectural review?

Ms. Newborn: Objection.

The Court: Sustained.

Q. Could you tell the Court what if anything the objectives of the Architectural Review are?

Ms. Newborn: Objection.

The Court: Sustained.

Q. In reviewing the Lakewood code, could you tell the Court what if any standards there are for architectural review in Lakewood.

Ms. Newborn: Objection.

The Court: Sustained.

Q. In your expert opinion, is it necessary to have absolute standards for every possible conceivable construction in an Architectural Review Code?

Ms. Newborn: Objection.

The Court: Sustained.

[181] Mr. Fisher: I would like to be heard.

You may remember the man, the architect, who on cross-examination they brought out all kinds of things as to the inappropriateness of the standards, and here we have an architect that can testify as to what to expect from an architectural review, and I am being hampered from getting it in.

The Court: Do you want to respond?

Ms. Newborn: I believe Mr. Finney already testified there was no standards for newspaper vending racks, so any general statements of the architectural book as to standards as to what should be applicable is irrelevant and also not within the area he is certified to.

Mr. Fisher: He is an architect and city planner.

The Court: I will sustain the objection.

By Mr. Fisher:

Q. One other question, Mr. Hartt, in this area as to devices about the same size: Are there any other devices that, under the Lakewood ordinances, that would be subject to an architectural review that would be of a similar size? A. Well, fences and certain small additions to houses would be subject to the architectural review; and then other types of small accessory structures on [182] private property would be subject to architectural review, and signs, both business identification signs, which might be larger than the boxes, but also the directional signs and other informational signs that you find on commercial property.

Q. Let me ask you the question: Could you explain to the Court the main objective of the architectural review?

Ms. Newborn: Objection, your Honor.

The Court: Sustained.

Mr. Fisher: I will proffer.

(Thereupon the following proffer was offered for the record:)

Mr. Fisher: I would proffer an answer that if the witness were allowed to answer, he would say it was to prevent the devaluation of the surrounding properties.

(Close of proffer.)

By Mr. Fisher:

Q. Mr. Hartt, I ask you to examine Defendant's Exhibit Z. A. Yes.

Q. Have you reviewed that document before? [183] A. Yes, I have.

Q. It is a zoning code of the City of Lakewood? A. That is correct.

Q. And have you had an occasion to travel about the City and down to Madison and Detroit and Clifton? A. Yes, I have.

Q. Have you made any observations as to what was shown on the map and how the actual uses conform to that? A. General land use patterns for the most part, and it conforms with the zoning districts.

Q. Now, in Section 901.181 there is a provision that newspaper dispensing devices are not permitted in residential districts. Are you aware of that? A. Yes.

Q. How does that relate to the zoning code? A. Well, I believe that is consistent with the zoning code, since I view newspaper boxes as a business and consequently should not be permitted in the residential districts.

Q. What about the proposition of advertising in a residential district? A. Well, that is always—

Ms. Newborn: Objection.

The Court: Sustained.

[184] By Mr. Fisher:

Q. Calling your attention to R-2, R-2 use districts, and I would ask you what the permitted uses are there? A. Single family or two-family homes.

Q. Anything else? A. No. Those are the only principal uses that are permitted.

Q. In reviewing that chapter on R-2, is there any commercial uses permitted at all? A. No, except for the accessory use of customary home occupation.

Q. Is there any provisions as to placement of a dispensing box or advertisement of any kind? A. No.

Q. Now, with respect to the city placing a commercial structure in a residential use district, what is your understanding as to the controlled zoning on this?

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Mr. Hartt, in your travels around the City of Lakewood, have you noted the location of buses, telephones, and shelters, bus shelters, and telephones, and various utility boxes, and so forth, in the right [185] of way? A. Yes.

Q. Would you indicate to the Court what these things have in common for placement in the right of way? A. I think they are essential services. First of all, the right of way is for vehicular and pedestrian traffic and related utilities, and essential public services, and I don't think the bus shelters and the telephones fit into the category of essential public services.

Bus shelters are obviously to keep people dry and protected from the wind when they are waiting for a bus.

and the telephones are to provide emergency outlets for people if they need to get help from the police or repair shop or hospital or doctor, or whatever they need to meet health and safety needs.

Q. What if any relationship do these items have to the health, safety, and welfare of these citizens of Lakewood?

A. I think they are very much related to protecting the health and safety of the Lakewood citizens for the reasons I just stated.

Q. Now, with respect to alternate channels of distribution in the City of Lakewood, did you have occasion to make a survey of existing and potential [186] outlets in the City of Lakewood? A. Yes.

Ms. Newborn: Objection.

The Court: I don't understand the question.

Mr. Fisher: I am trying to think of how I can say it otherwise—I will clarify it.

By Mr. Fisher:

Q. With regard to the installing of newspaper outlets for selling newspapers in the City of Lakewood, did you have the occasion to do a survey on alternate existing and potential outlets for sales of newspapers in the City of Lakewood? A. Yes, I have.

Q. Could you tell the Court what you did in doing this survey. A. Well, I traveled the commercial streets, mainly Madison and Detroit in Lakewood, and I determined those businesses which in my view customarily will sell newspapers, either inside or outside or because of their locations at major intersections, or near bus stops, could have dispensing boxes conveniently on their site for customers of their businesses or passing customers.

Q. And could you tell the Court approximately how [187] many outlets you found? A. About 75.

Q. And in your opinion might there be other outlets in addition to that? A. There could be.

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. In your survey did you cover every inch of Lakewood? A. No, not completely. There are some facilities that perhaps could be considered as potential outlets, but perhaps might not be as inclined to want to sell newspapers at some of the other businesses that are included in the 75 that I mentioned.

Q. Calling your attention to Defendant's Exhibit H. A. Yes.

Q. Could you describe to the Court what this is and how it was constructed. A. These are the types of businesses that are included in that list, the list of potential outlets which numbered 75.

It is basically—well, there are five listed here, and it constitutes two different classifications. [188] One is the business that typically sells newspapers; grocery stores, restaurants, and drug stores, news stands, and news stores; and those are divided into four classifications:

I have divided them into those that are open 24 hours, but their business or their store is located right on the street right of way line, so there is no room for a dispenser other than the private property. If they put a dispenser outside, it would be on public property.

The second category is the facility that is set back from the right of way, so there is room on private property to put the dispenser.

The third and fourth categories are the same comparison, but those businesses may not be open 24 hours, but still can sell the newspapers, either exclusively selling it

inside if the business is set on the right of way, or inside or outside if the business is set back from the right of way.

And the last one are those businesses which because of their location could, but may not, typically be selling newspapers, but they are still high volume businesses and high volume intersections; gas stations, large office buildings, and fast food and restaurants, and similar types of outlets.

[189] Q. Now, those are the categories. Were there any other assumptions that you made with respect to the likelihood that newspapers would be sold at these places?

A. Well, if the assumption is that they are in business, and presumably I would assume they would get a fee for handling the boxes on their property, and through the fee would be encouraged to sell the papers.

Ms. Newborn: Objection, and I make a motion to strike that.

The Court: Sustained.

Mr. Fisher: I am not sure I understand the basis of that objection.

The Court: It is not relevant.

Mr. Fisher: Not relevant as to how he selected a site?

The Court: It is an assumption that I won't allow.

Mr. Fisher: Okay. Thank you, your Honor.

By Mr. Fisher:

Q. Now, with respect to the location of those sites in the City of Lakewood, could you tell the Court the longest distance that a person living in Lakewood would have to travel to get to one of these sites?

[190] Ms. Newborn: Objection, and I object to any further questions about these particular sites.

The Court: Sustained.

Mr. Fisher: I would offer a proffer.

(Thereupon the following proffer was made for the record:)

Mr. Fisher: I would proffer the answer that if the witness were allowed to answer, he would answer that any person in Lakewood could reach one of these sites by traveling or walking a quarter of a mile or less.

(Close of proffer.)

By Mr. Fisher:

Q. Now, taking into account the alternate channels of sales and distribution of newspapers in the City of Lakewood, you form an opinion as to the necessity from the point of view of planning of permitting newspaper dispensing boxes on public property at all?

Ms. Newborn: Objection, your Honor.

The Court: I will allow him to answer.

A. Well, there are numerous convenient outlets of either existing or potential profit properties that are convenient to all residents of the City of Lakewood, [191] and since it is a business use, I believe it ought to be governed by zoning, and therefore restricted to private property and still provide the convenience to allow these papers to be available to the residents.

Q. Now, with respect to the City of Lakewood itself, could you tell the Court approximately what the land area is? A. 5-1/2 square miles.

Q. Do you know what the population is? A. A little over 60,000, I believe.

Q. Could you describe the location of the City of Lakewood? A. Well, it is a built-up suburb, the first one immediately west of the City of Cleveland, and it is an older suburb, primarily a residential community, and geographically it is basically laid out east to west with

a longer dimension, about three or three and a half miles from east to west, and maybe a mile and a half to two miles north and south.

Q. Tell the Court what the northern border of the City of Lakewood is. A. It is Lake Erie.

Q. What is the western boundary? A. I guess it is Bay Village and Westlake, I believe—no—it is Rocky River.

[192] Q. And to the south and east, what is the City of Lakewood bordered by? A. The City of Cleveland.

Q. How would you describe the age and character of the City of Lakewood? A. It is an older residential community, as I said, principally residential and substantially or almost completely a built-up community, as are many of the so-called inner ring suburbs around Cleveland and most metropolitan areas.

Mr. Fisher: One moment, your Honor.
(After an interval.)

By Mr. Fisher:

Q. Earlier you testified about certain problems that you saw arising and referred to photographs depicting these problems.

Are there any problems that are not covered by the City of Lakewood that you noted in your observations, including the photographs?

Ms. Newborn: Objection.

The Court: Sustained. The question is kind of vague.

Q. All right. Get to the point: In your observations of the ordinance, Section 901.181, is there any provision in that as to the [193] location with respect to handicap ramps? A. No, there is not.

Mr. Fisher: No further questions at this time.

The Court: Ms. Newborn.

CROSS EXAMINATION

By Ms. Newborn:

Q. Mr. Hartt, you have been involved in the area of city planning for some time, as I understand it; is that right? A. That is correct.

Q. And you testified quite a number of times in court? A. Yes.

Q. —about a variety of city planning subjects; is that right? A. Yes.

Q. But this is the first time that you have been asked to do an analysis and render an opinion about newspaper vending machines; is that correct? A. That is correct.

Q. At the time you made your analysis you were aware that the distribution of newspapers are protected by the First Amendment; is that right?

[194] Mr. Fisher: Objection.

A. I gather.

The Court: Just a second. He may answer.

Mr. Fisher: She is asking for a legal conclusion.

The Court: He may answer the question, counsel.

A. I gather there is some protection to the extent that they are protected. I cannot say.

Q. You are not informed as to the legal standards that are applicable to regulations impinging on First Amendment rights?

Mr. Fisher: Objection, if he knows what is a legal standard.

The Court: He may answer whether or not he was involved as a city planner.

A. I am vaguely aware of some of the criteria that are used.

Q. At the time you initially reached your conclusions, you were not aware of the standards that were applicable; is that right? A. I guess that is right.

Q. And as I understand it, you were requested by the City of Lakewood to express an opinion as to the manner in which newspaper vending machines should be [195] controlled from a land use and zoning perspective? A. Yes.

Q. And in order to reach the conclusion you used the land uses in Lakewood and the Lakewood ordinances? A. Yes.

Q. And after reviewing your analysis, you reached a conclusion; is that correct? A. Yes.

Q. If I understand your testimony today, the conclusion that you reached is that there should be a blanket prohibition of newspaper vending machines on public property in the City of Lakewood? A. That is correct.

Q. In fact, as I understand your testimony, you are of the opinion that there should be a blanket prohibition of newspaper vending machines on public property, and that is applicable generally to other cities as well? A. Yes.

Q. And you also indicated in your testimony today that you feel that the regulations and restrictions in the Lakewood ordinance regarding newspaper vending machines are not restrictive enough; is that correct? A. If you are making the assumption that somebody is to go against my recommendations, and they are permitted [196] on the right of way; that is correct.

Q. Then the restrictions are not restrictive enough? You believe that all of these vending machines should have a uniform appearance and imposed by ordinance? A. By ordinance or architectural review.

Q. You believe that the City should be able to select the exact location where these are placed; is that right? A. Yes.

Q. Mr. Hartt, in the City of Lakewood there is a great variety of architectural styles; is that correct? A. Yes.

Q. And there is already a great deal of variety among the styles of the objects on the right of way; is that correct? A. Yes.

Q. So what you are suggesting is that if any vending machines were to be placed in a right of way at all, that is where you should start to impose uniformity as to the design of the objects on the right of way? A. That is one place. There are the guidelines, if they are not stated, that are used by various people when they are putting things in a right of way, [197] whether it be a bench or rubbish container or whatever.

Q. This is one place where you try to start to harmonize the appearance of the right of way? A. I would certainly think that these ought to be harmonized in the right of way, yes.

Q. Despite the fact there is already a great variety on the right of way? A. That is correct.

Q. Mr. Hartt, city planners categorize streets by type; is that correct? A. Oftentimes.

Q. And there are four categories typically referred to by city planners? A. Well, yes.

Mr. Fisher: Objection. It is not something that we have gone through on direct examination, and I think she is trying to make her own case on our witnesses.

The Court: Overruled.

By Ms. Newborn:

Q. The fourth category is streets or expressways, major arterial streets, collector streets, and local streets?

Mr. Fisher: Objection.

The Court: Overruled.

A. You can use those.

[198] Q. In categorizing these streets, the city planners look at where the streets go, the amount of traffic, the width of the street, and the speed of the traffic?

Mr. Fisher: Objection.

The Court: You can note a continuing objection, counsel. Overruled.

Mr. Fisher: Thank you, your Honor.

A. Yes. Those are the factors.

Q. And a major, a main arterial use is generally one that takes people from city to city? A. Yes.

Q. And collector streets collect traffic from local streets and take them to a major street; is that right? A. Yes.

Q. And a local street is one that is primarily, primarily provides access to people's homes? A. Yes.

Q. And you are familiar, you have indicated, you are familiar with Clifton Boulevard in the City of Lakewood? A. Yes.

Q. Under these categories of streets, Clifton Boulevard would be identified or described as a major arterial street? [199] A. Yes.

Mr. Fisher: Objection.

The Court: Overruled.

By Ms. Newborn:

Q. And Clifton Boulevard has six lanes? A. Yes.

Q. —a State route? A. I believe so.

Q. And it has a 35 miles an hour speed limit? A. Probably. I don't know what the speed limit is.

Q. And it has several bus lines; is that correct? A. Yes.

Q. In city planning the appropriate uses of a right of way are determined by the category of the street; is that correct? A. In part.

Q. So, for example, a bus shelter would be the appropriate accessory to a major street? A. Assuming there are bus lines on that street, yes.

Q. And telephone booths might be an appropriate accessory use for major arterial streets? A. Yes.

Q. And trash containers also? A. Yes.

Q. And the reason these are appropriate uses is [200] that they serve a public purpose? A. Related to the health and safety and welfare, yes.

Q. But you do not believe that newspaper vending machines are an appropriate accessory use of a major artery street? A. That is correct.

Q. And the reason is you don't believe the distribution of the newspapers serves any public purpose; is that correct? A. That is correct.

The Court: You say a newspaper does not serve any public purpose?

The Witness: In the same context as we are talking about other right of way facilities, if I may add.

Ms. Newborn: May I have one minute?

(After an interval.)

Ms. Newborn: I have no further questions, your Honor.

[201] RE-DIRECT EXAMINATION

By Mr. Fisher:

Q. What are the criteria that you used to measure the appropriateness of devices in a right of way?

Ms. Newborn: Objection.

The Court: Overruled. You may answer.

A. I mentioned there were two primary functions of an artery:

(1) Move traffic and pedestrians; and secondly, a place where essential public utilities and services that are related to the health and safety of the residents of the surrounding areas.

Q. Do you see any relationship to health and safety of people having a newspaper dispensing device in these areas? A. No. As I mentioned earlier, I think that is a business.

Mr. Fisher: May I have a minute?

(After an interval.)

Mr. Fisher: No questions.

Ms. Newborn: Just a few short ones.

[202] RE-CROSS EXAMINATION

By Ms. Newborn:

Q. Mr. Hartt does zoning generally cover the use and development of the privately held property exclusive of the right of way?

Mr. Fisher: Objection. It was not gone into on redirect.

The Court: Overruled.

A. Generally zoning—

Mr. Fisher: —also I object because I asked him the question on direct about right of way, and there was an objection, and he was not allowed to answer the question as to whether the city is subject to zoning as well.

The Court: We have noted your objection. Overruled.

The Witness: Would you repeat the question.

(Thereupon the pending question was read by the court reporter as follows:)

"Q. Mr. Hartt, does zoning generally cover the use and development of the privately held property exclusive of the right of way?"

Mr. Fisher: I also object on the ground that it is asking in a general sense instead of a sense [203] of the City of Lakewood and the City of Lakewood Zoning Code.

The Court: Overruled. Proceed.

A. The zoning typically goes and includes all streets and the rights of way, and then it further says that the private development, the private use of land, that the regulations pertaining to private development are related to the private property.

Q. Mr. Hartt, do you remember when I deposed you in my offices? A. I do.

Q. And you do remember that you were under oath at that time? A. Yes, sir.

Q. Do you remember I asked you if you didn't understand a question that you were to please tell me? A. Yes.

Q. If you remember, I asked you if you didn't know the answer, to tell me?

Mr. Fisher: Objection to all these questions, and after I have gone on re-direct, and she is confined to the subjects I directed on my redirect. She is going far afield.

The Court: Overruled.

By Ms. Newborn:

Q. And do you remember I told you that if you didn't [204] know the answer, please tell me? A. Yes.

Ms. Newborn: I am referring to a deposition. I believe I provided the Court with a copy, and it is page 35, and I am going to start with line, I believe it is line 4.

The Court: Just a moment, please. Page what?

Ms. Newborn: Page 35. This is the second volume. There are two volumes to Mr. Hartt's deposition.

The Court: I am looking at page 35, and it is continued, the continued deposition of David B. Hartt.

Ms. Newborn: Yes.

The Court: Okay.

By Ms. Newborn:

Q. Mr. Hartt, at that deposition do you remember me asking these questions and giving these answers:

"Q. Let me see if I understand you correctly. When you are looking at the appropriate use for a right of way, what you are looking at is whether it is an appropriate access use to the street; is that correct?"

"A. Right, the public use related to the street."

[205] Mr. Fisher: Objection.

By Ms. Newborn:

Q. And then:

"Q. And zoning generally governs the use and development of a privately held property; exclusive of the right of way?"

"A. Right."

Do you remember my asking those questions and your giving those answers?

Mr. Fisher: Objection to all this, and I ask it be stricken for the reasons previously given. She is going far afield from the scope of the redirect examination.

The Court: Overruled.

By Ms. Newborn:

Q. Do you remember my asking you those questions and you giving those answers? A. Yes.

Q. Were those truthful answers when you gave them? A. Yes. I am not sure they are any different than the answers I just gave.

Ms. Newborn: That is all.

Mr. Fisher: No further questions.

Mr. Nelson: No questions.

The Court: You may step down.

The Court: * * * [206] Call your next witness.

Mr. Fisher: Anthony Sinagra.

ANTHONY SINAGRA, having been called as a witness on behalf of the defendant, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fisher:

Q. Would you state your name, please. A. Anthony C. Sinagra.

Q. Where do you live, Mr. Sinagra? A. 1218 Webb Road, Lakewood, Ohio.

Q. At the present do you have an official connection with the City of Lakewood? A. Mayor of the City of Lakewood.

Q. And for how long have you been Mayor of the City of Lakewood? A. Since January 1, 1978.

Q. Prior to that, did you hold any official position with the City of Lakewood? A. Councilman-at-large.

Q. How long were you in that position? A. Since May of 1963.

[207] Q. And prior to that did you have any official position with the City of Lakewood? A. Assistant Prosecutor.

Q. For how long did you have that position? A. A little over three years.

Q. And was that your first position with the City of Lakewood? A. No.

Q. What other positions before that? A. Administrative Assistant to two mayors.

Q. And did you have any other positions with the City of Lakewood prior to that? A. No, sir.

Q. Okay. Mr. Sinagra would you indicate to the Court your education. A. Bachelor of Science in governmental administration, John Carroll University, and Juris Doctorate, Cleveland State University.

Q. Now, with respect to an ordinance that was prepared and adopted, Section 901.181, relating to the newspaper dispensing devices, were you familiar with the process whereby that was developed? A. Yes.

Q. Could you indicate to the Court how that was done. [208] A. It was drafted by the Law Department.

Ms. Newborn: Objection.

The Court: Overruled.

A. (Continuing)—drafted by the Law Department and presented to the City Council.

Q. Was there any cabinet review prior to the presentation to the Council? A. Yes, sir. The cabinet review procedure is the same with all ordinances, that we have a cabinet meeting, and whatever is on the counsel docket is reviewed by all department heads and myself.

Q. And was that done in this case? A. Yes.

Q. Now, have you received any applications for placing newspaper dispensing devices for The Plain Dealer? A. No.

Q. What is your understanding of the locations where they expressed some interest? Do you have an understanding of that? A. Well, I know that they are interested in placing machines in the City of Lakewood, yes.

Q. Can you indicate to me the process of this ordinance being enacted and what you feel your duty is if an application is made.

Ms. Newborn: Objection, your Honor.

[209] The Court: Sustained.

By Mr. Fisher:

Q. Mayor Sinagra, it has been testified to that you have unbridled discretion in granting permits or not granting them under the provisions of this ordinance which I will refer you to, and you have the text in Joint Exhibit 4.

Would you indicate to the Court what the intent of the Council was, being at the meetings and your understanding of what discretion you had from reading the ordinance.

Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. Would you just read the ordinance. Would you indicate to the Court what discretion you have.

Ms. Newborn: Objection.

The Court: Sustained again, counsel.

Q. For what reason do you believe that you could deny an application for a permit under these ordinances?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: I will proffer.

[210] (Thereupon the following proffer was put on the record:)

Mr. Fisher: I would proffer the answer that the witness would indicate that the intent of the ordinance was that it is mandatory to allow the newspaper distributing devices where allowed and where applied for in conformity with the ordinance, that the Mayor cannot refuse to permit their location except for reasons of not meeting the standards of the ordinance or for factors of health and safety, and that would be the answer of the witness.

(Close of proffer.)

By Mr. Fisher:

Q. Mayor Sinagra, looking at Defendant's Exhibits in front of you, and look at EE, and specifically at Section 1325.04, and you will note in there that that section was amended by Ordinance No. 5781, passed on June 15, 1981.

The question I have is, do you recall what was covered by the architectural review prior to that date?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: Your Honor, I would like to [211] offer a certified copy of the ordinance which specifically says what was covered at that point of time and what was not, because there was testimony as to certain devices that were installed without architectural review, and our intent is to make the record clear that only commercial applications were covered prior to this date, and that is the sole purpose of this question.

The Court: You may proffer it.

Mr. Fisher: All right.

(Thereupon the following proffer was placed on the record:)

Mr. Fisher: I am offering the certified ordinance, 57-81 as Defendant's Exhibit KK.

(Close of proffer.)

Ms. Newborn: So the record is clear, we are going to object.

The Court: Yes. KK is a proffer. Proceed.

By Mr. Fisher:

Q. With respect to the architectural review provisions, could you explain to the Court your reasons for wanting that included in the ordinance.

[212] Ms. Newborn: Objection.

The Court: Sustained.

By Mr. Fisher:

Q. With respect to architectural review in this city, does the City have any programs whereby they are investing funds for this improvement of the City?

Ms. Newborn: Objection.

The Court: Sustained.

Q. With respect to—

Mr. Fisher: Excuse me. I am going to proffer.

(Thereupon the following proffer was placed on the record:)

Mr. Fisher: I would proffer that the answer to the last question is that the City of Lakewood does have an active commercial area revitalization program and they are investing millions of dollars to upgrade the appearance of the city.

(Close of proffer.)

By Mr. Fisher:

Q. Mayor Sinagra, calling your attention to the telephone booths that are located along the streets of Lakewood, and I would ask under what authority are [213] they installed? A. Telephone booths are installed pursuant to the authority of the Director of Public Works in dealing with public utilities.

Q. Could you indicate to the Court the purpose of having these telephones installed along the right of way? A. The primary purpose that the City permits them, the reason we permit them primarily is because they are the means of communication during an emergency, especially an emergency during the nighttime hours.

These devices can be used by motorists or pedestrians without the insertion of any coins in the case of an emergency.

Q. And are the sites where they are located, were these sites selected by the City? A. Yes, the Public Util-

ities comes to the City and works with the Director of Public Works in a site location.

Q. And what are the criteria for selecting the sites, if you know? A. Well, the criteria involves the health, safety and welfare of the community in their specific placement, just as it would anything that is placed in the public right of way.

[214] Q. With respect to the bus shelters, could you indicate to the Court how these have been permitted to be constructed in the right of way? A. Bus shelters are dealt with on an individual basis by ordinance. Each bus shelter is mentioned in a specific ordinance before it is installed.

Q. With respect to the architectural review as read in Section 1325.04, it says that the City is included in the architectural review. Now, my question is, are bus shelters included in that as well as for future reference?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: I will proffer.

(Thereupon the following proffer was placed on the record:)

Mr. Fisher: I would proffer for the record that the witness if allowed to answer would indicate that future installations are subject to architectural review of bus shelters and also another question would be as to telephone booths and the same answer would be that they are subject to this in the future.

[215] (Close of proffer.)

Mr. Fisher: I have no further questions, your Honor.

Ms. Newborn: May I consult a moment?

(After an interval.)

Ms. Newborn: I have no questions.

Mr. Nelson: Nothing.

The Court: You may step down.

The Witness: Thank you, your Honor.

Mr. Fisher: We have one last witness. We are calling Mr. Thrasher on cross-examination for limited purposes.

Ms. Newborn: I object. They had ample ability to cross-examine him, and I see no need to recall him at this point.

We did not call any witnesses after him, so it could not be to respond to anything we put on additional.

Mr. Fisher: I listed Mr. Thrasher for cross-examination in the pretrial statement, and I wish to call him as part of our case.

I also believe that the Court sustained objections to certain questions that I asked during cross-examination on the Plaintiff's side because it [216] was something that would be proper were it to be used in the defendant's case.

I think I have taken all the steps. I indicated that we would be calling Mr. Thrasher to testify on cross-examination.

The Court: You may call him, counsel.

There is a different set of rules than there is in Common Pleas Court when we talk about cross-examination.

Cross-examination, as I understand it, in Federal Court, is not limited to just one side.

If you are going to call a witness on cross-examination, he may be your witness, because he is hostile, and that doesn't mean the other side cannot question him.

The Rules of Civil Procedure, as I understand it in State Court, I have never seen a difference ex-

pressed there. Always I have seen the expression that the Courts have talked about—well, you may call him.

Mr. Fisher: We call Mr. Thrasher.

[217] ROBERT THRASHER, having previously been called as a witness, and now being called as if on cross-examination by the defendant, was examined and testified as follows:

CROSS EXAMINATION

By Mr. Fisher:

Q. Mr. Thrasher, you have been previously sworn?

A. Yes.

Q. And you are still under oath from your first testimony.

The Court: He sure is.

Q. Okay. In front of you are the Defendant's Exhibits. I am asking you to look at JJ. It is right at the very end of the folder, very bottom. A. Yes.

Q. I am asking you, are these documents in JJ matters of public record on file with various cities?

Ms. Newborn: Objection.

The Court: Well, I don't understand the relevance, counsel, of these documents.

Mr. Fisher: The relevance—all right. I will explain it.

In the ordinance that we have, we provided for indemnification, and also for having insurance [218] certificates for protection of the City in a lower amount, and they have—and in Mr. Thrasher's deposition he produced these, saying they were public records and indicating that they did have certificates of insurance, exactly what the City of Lakewood is

asking, in one million dollars, which is far in excess of what the City is asking for, so I am seeking to introduce these, which are public records, as indicative of where The Plain Dealer has boxes and where the certificates are on file as public records.

Ms. Newborn: Your Honor, I think this is a constitutional question, whether a particular regulation is over restrictive or not, and I think it is totally irrelevant.

The Court: I will overrule your objection.

By Mr. Fisher:

Q. The question was, Mr. Thrasher, are these the certificates of insurance, including cities as named insurers in various cities where you have coin operated newspaper vending devices? A. These are copies, yes.

Q. And that includes accidents involving your boxes as well; is that correct? A. Yes.

Q. Would it be fair to say there is very little [219] difficulty in securing one of these certificates under your blanket policy?

Ms. Newborn: Objection.

The Court: Sustained.

Mr. Fisher: I will proffer it.

(Thereupon the following proffer was placed on the record:)

Mr. Fisher: I would proffer that I asked the question during the deposition, and the witness would answer that there is no difficulty in securing these certificates.

(Close of proffer.)

Mr. Fisher: That is all I am going to ask you about those, Mr. Thrasher. I have one other question:

By Mr. Fisher:

Q. Where you have these newspaper dispensing boxes installed on private property, is it a fair statement to say that you are not paying any consideration whatsoever for the location of these boxes?

Ms. Newborn: Objection.

The Court: He may answer.

A. I know of no place that we are paying.

[220] Mr. Fisher: No further questions.

Ms. Newborn: I have no further questions.

Mr. Nelson: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Fisher: We offer at this time all of the exhibits.

Ms. Newborn: Your Honor, I need a few minutes to go over the list.

The Court: Why not—let's take a short recess, and counsel, you can see what exhibits you are objecting to during the recess.

(Recess taken.)

The Court: Be seated, please. You are offering all your exhibits?

Mr. Fisher: Yes. Your Honor, should I specify them by name?

The Court: No, if you are offering them all, I assume you are offering them all.

Ms. Newborn: Your Honor, the plaintiffs have objections to Exhibits AA, BB, DD and GG.

We do not object to the photographs, but we do object to Mr. Hartt's cover sheet, and we are objecting to HH, II, and JJ.

[221] The Court: Just so there is no question, the defendant's exhibits are A through JJ.

Mr. Fisher: Yes. A through Z and then Double A through Double J, and I also proffered a certified copy of the ordinance, which is Double K.

The Court: That is already proffered. I sustained the objection, and you proffered it for the record. AA is a list of all-night business selling newspapers.

Ms. Newborn: Yes.

The Court: What is your objection?

Ms. Newborn: Your Honor, we object on the grounds of relevance and also the ground that on that exhibit there are several motels where it is indicated that only three to five copies are delivered on a daily basis to residents inside the hotel, and the exhibit itself is misleading because it does not distinguish—I explained that before we started—and he was unwilling to modify the list.

Mr. Fisher: Apparently the earlier objection is The Plain Dealer was not popular at those hotels. Captain Glenn Walker testified they were sold over the counter, and you could buy them; and he also testified you could buy them all night around the clock [222] at all the other places, and it is as an alternate means of channels of communication. They are totally relevant.

The Court: I will allow it.

Ms. Newborn: Defendant's Exhibit BB, and the objection is as to relevance.

Mr. Fisher: Eric Lane went through the photographs of all the sites located in the City of Lakewood and—

The Court: I will allow it over objection.

Ms. Newborn: And the same objection to DD.

Mr. Fisher: Your Honor, as far as DD, it is a composite and shows the locations listed in Exhibits AA and BB.

The Court: We will allow it over objection.

Ms. Newborn: Objection to GG. We don't have an objection to the photographs, but we do think Mr. Hartt's

cover sheet should not be part of the exhibit. He testified about those photographs, and his handwriting notes about them should not be admissible.

Mr. Fisher: As far as the cover sheet, Mr. Hartt testified as to the location of each photograph [223] and also testified as to his observations of what feature he was looking at in the photographs.

The Court: We will sustain it as to the cover sheet, and the rest of the exhibit may be allowed without objection.

Ms. Newborn: On HH we object on two grounds:

(1) Is relevance, and the other is that Mr. Hartt explained in the testimony that in fact he made no effort to determine if each of the outlets did sell The Plain Dealer. He was merely looking at that to determine where in his mind it might be feasible.

Mr. Fisher: It is totally relevant, since in First Amendment cases the alternate means and channels of communication are always a factor, and as far as whether The Plain Dealer is sold there or not, that is not something within the control of the City. It is something within the control of The Plain Dealer.

If they are not diligent and offer the proper consideration for locating them, this is not our problem.

These are The Plain Dealer's problems, and it is totally relevant.

[224] The Court: Also it would be in the control of the person they wanted to sell to?

Mr. Fisher: Yes.

The Court: I will sustain the objection.

Ms. Newborn: Your Honor, I object to Exhibit II, which is the American Planning Association article, and I object on the grounds of hearsay.

The Court: Sustained.

Ms. Newborn: I object to JJ on the grounds of relevance.

Mr. Fisher: I think it is totally relevant. Mr. Thrasher testified that they have these as a matter of public record.

The Court: Overruled. It may be received over objection.

Ms. Newborn: Thank you, your Honor.

The Court: Any other exhibits that counsel wish to offer?

Mr. Nelson: Excuse me, no, your Honor.

Ms. Newborn: Your Honor, we did have Plaintiff's Exhibit 38, and we had testimony about it by the City Engineer.

The Court: Any objections?

Mr. Fisher: I objected before, and I [225] object again. I think the facts are on the record, whether it is a State or Federal route, and it is encumbering the record, and everybody testified to it.

The Court: It may not be received.

Ms. Newborn: Thank you, your Honor.

If I might, also we do have in stipulations that are part of the pretrial order, and I don't know how you would like to enter those on the record.

The Court: Well, we will file the pretrial order, and the pretrial order will become part of the record.

Generally I file it prior to trial. The only reason I did not file this was because there were additions, and I wanted to make sure we covered those, and that will be filed today and made part of the record.

Ms. Newborn: Thank you.

The Court: Any rebuttal witnesses?

Ms. Newborn: No. We have no rebuttal witnesses.

The Court:—All right. Now, counsel, this is a non-jury trial. I won't require you to make arguments unless you want to.

The only thing that is generally suggested [226] be done by this Court is that you have submitted findings of fact and conclusions of law; however, after a trial has ended, you may wish to amend those findings of facts or conclusions to conform to the evidence.

If you wish to do that, the only thing I want to know, if you wish to handle it that way, is how much time would you need?

Mr. Fisher: I would like to do that, your Honor, and also I would remind you that we have had a consolidation hearing, so we would like to have an opportunity to file a brief in the case brought by The New York Times.

The Court: How much time will you need?

Ms. Newborn: If it is really a matter of my findings of fact and conclusions of law, I would think we could complete that within the next several days.

The Court: Any brief that you wish to file with that?

Ms. Newborn: I hope not, at least by Lakewood and The Plain Dealer, that there has been ample briefing and no further briefing is necessary.

Mr. Fisher: We would like the opportunity to file this a week from tomorrow, a week from Friday.

[227] The Court: Okay. All right. That date is?—

Mr. Fisher: And we would like to have a week to file the amended findings and conclusions.

The Court: Everything will be in by the 20th of April.

Mr. Fisher: Yes, as well as our brief.

The Court: Very well.

Mr. Fisher: One other matter:

I made a motion to view the premises, and it is up to you to decide that. I feel it would be very desirable to ride the areas that we are talking about, and each city has a little different characteristics, and I think that the orientation would be well worth it, and of course this is up to the Court.

The photographs show a very narrow scope of what people want them to see. The overall orientation I feel would be worthwhile.

The Court: The Court has listened to the evidence in this case, and the Court said at the outset I would deny it unless there is something in the evidence that I should reconsider, and I have seen nothing that causes me to feel I need to reconsider that order.

The only thing we need to do, however, is [228] on—and I am not sure of the exhibit number—maybe it is GG, is the one, and you have certain exhibits that the Court did see the photographs, and very frankly, from the pages that are in the exhibit, and I wish to go through those and make sure there is no objection.

Mr. Fisher: Those are the originals.

The Court: The actual photographs. Very good. I take it there are no objections?

Ms. Newborn: No, your Honor.

Mr. Fisher: This is what the witnesses who testified were looking at as the actual photographs.

The Court: I understand that.

I understand there is no objection to the photographs themselves. This folder does have the actual photographs?

Mr. Fisher: Yes, your Honor.

There is one other point:

During pretrial I indicated that we would have the Lakewood codified ordinances available for reference by either party or the Court, and I do have those there, so

if anybody wishes to refer to any provisions that they feel are relevant, that it could be done. It is a public record.

The Court: I understand. Is there an [229] objection to that?

Ms. Newborn: No.

The Court: Why don't you mark it as an exhibit?

Mr. Fisher: The reason why I—

The Court: You want it back?

Mr. Fisher: No. You have a lot of bulky evidence already, and maybe somebody is going to want to refer to one section.

The Court: If counsel has no objections—

Ms. Newborn: I am satisfied it is the codified references.

The Court: We will mark it—well, if counsel is satisfied, we won't mark it.

Ms. Newborn: I am satisfied.

Nos. C83-63, C84-1071

(CONSOLIDATED)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.

Plaintiff,

vs.

CITY OF LAKEWOOD

Defendant

and

THE NEW YORK TIMES COMPANY,*

Plaintiff,

vs.

CITY OF LAKEWOOD,

Defendant.

**ADDITIONAL PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF DEFENDANT,
CITY OF LAKEWOOD**

(Filed April 20, 1984)

Attached and incorporated herein by reference the same as though fully rewritten at length are the originally submitted proposed Findings of Fact and Conclusions of Law of Defendant, City of Lakewood. The following paragraphs contain the additions now proposed on behalf of the City of Lakewood after trial and are numbered A-1, A-2, etc. to reflect that they are additional.

*Cases consolidated at trial court. The New York Times Company's appeal in the Sixth Circuit Court of Appeals was dismissed and remanded to District Court for dismissal under the doctrine of abstention.

I. FINDINGS OF FACT

A-1. The newspaper boxes, advertising the name of the newspaper, also have an additional feature of a "rack card" which is an additional advertising device.

A-2. The refusal of the purveyors of coin-operated newspaper dispensing boxes to pay for the use of property upon which they are placed, whether private or public, severely limits the number of potential outlets for such newspapers, is unreasonable, and limits the number of outlets well beyond any impact that could be attributed to the Lakewood Ordinances.

A-3. Newspaper dispensing boxes located near the curb adjacent to places where street parking is permitted hinder the opening of car doors and limit the use of such parking spaces by the public.

A-4. People do stop their cars in the street to purchase newspapers from the newspaper dispensing boxes located along the street, interfering with traffic by such stopping and also by opening their doors into traffic, which is hazardous as observed by Captain Glenn Walker.

A-5. Newspaper dispensing boxes by their nature have given rise to crime in that newspapers are stolen from the boxes, the boxes themselves have been stolen, and there is experience of problems with the boxes being knocked down, all of which causes a nuisance in the public right of way.

A-6. The only apparent reason for the Plaintiff to refuse to clean up around newspaper dispensing devices including debris which may blow against said boxes and also debris generated by the users thereof, is that they do not have such a requirement in their Union contract.

A-7. The only cleaning of the area programmed by the Plaintiff of newspaper dispensing boxes is one time per year.

A-8. Use of the tree lawns and sidewalks adjacent to the streets by the City of Lakewood is limited only to accessory uses relating to the health and safety of the public using the streets or located along such streets, e.g., telephone poles, lines, boxes, and stations are necessary for free emergency calls from the right of way as well as from the residents and occupants along the streets; electric poles and facilities are necessary to provide light for the streets and operation of traffic lights; and bus shelters are necessary for the health of the citizens and protecting them while they wait for public transportation. Newspaper boxes have no health or safety purpose in the public right of way and are there only for the convenience of the Plain Dealer to sell to its customers.

A-9. There is no area within the City of Lakewood more than one quarter mile from an all night newspaper outlet, i.e., stores open all night or newspaper dispensing boxes located on property owned other than by the City of Lakewood.

A-10. The two hundred fifty foot (250) distancing requirement of the Lakewood Ordinances permits a newspaper to locate one or two newspaper boxes at every block.

A-11. It is uncontroverted that the distancing limitations of Section 901.181 allow location of the Plaintiff's newspaper dispensing boxes at every site which they selected.

A-12. There is no stopping permitted along Clifton Boulevard located in a residentially zoned use district in

the morning hours at the very time that the Plaintiff is attempting to sell its newspapers along said street, which would induce traffic to stop for the purchase of same and cause accidents in the opinion of Captain Glenn Walker.

A-13. There are ample potential outlets for newspapers and placement of newspaper dispensing devices in the City of Lakewood which should be used for their intended purpose, the same as the dispensing of all other products, so that use of City property along the streets and otherwise for such purpose is absolutely unnecessary.

A-14. The allocation of the non-residential areas, the BR (Business Residential), B1 (office) and X (Industrial) areas of the city include the entire breadth of the City along Madison and Detroit Avenues, several streets in the Southeast sector of the City, over half of the area along West 117th Street, an area adjacent to Warren Road in the southern central portion of the City and an area along West Clifton and Sloane Avenues in the western portion of the City as shown by the zoning map of Defendant's Exhibit "Z", which in addition to the non-City owned property sites, provide more than adequate sites for placement of newspaper dispensing boxes along the streets of the City of Lakewood, which sites are all in close proximity to the homes and business in the City of Lakewood. The only reason why the plaintiff has not placed newspaper dispensing devices along the streets of Lakewood where permitted, is that the plaintiff has not applied for such use.

A-15. The Plaintiff never did a market study prior to selecting sites for their coin-operated newspaper dispensing boxes and have no proof or evidence whatsoever to demonstrate that any newspapers would be sold therefrom or that the persons desiring to purchase such news-

papers would not purchase their newspaper at some other outlet.

A-16. On Saturdays and Sundays, the sole purpose of the coin-operated newspaper dispensing boxes is advertisements, since the plaintiff does not even place newspapers in such boxes, especially at sites such as selected by the plaintiff at bus stops, because the work traffic at the bus stops is not there on days when most people are not employed.

A-17. The City of Lakewood has done nothing to prevent the circulation of newspapers in the City of Lakewood.

A-18. The provisions of Section 901.181 are the least restrictive regulations for placement of newsboxes along the streets of Lakewood; site selection is not restricted specifically, e.g., in handicapped ramps or so as to restrict egress from parked vehicles, for every conceivable proper reason.

A-19. Given the availability of outlets and make up of the City of Lakewood, it is poor City planning to permit newspaper dispensing devices along the streets, especially since placement of anything in such areas increase the probability for accidents and injury.

A-20. The Lakewood Division of Streets receives an average of four (4) complaints per day of accidents in the areas adjacent to the paved streets including falls and running or walking into fixed objects. There were 153 off the road vehicular accidents in Lakewood in 1983. Over a period including 1982, 1983 and part of 1984, installations hit were: four (4) fire plugs, eight (8) guardrails; one (1) mail box; seventeen (17) parking meter poles; fifteen (15) sign poles; two (2) signal poles; one

(1) telephone booth; four (4) trees and twelve (12) utility poles. Improperly attached erections in the right of way become missiles likely to cause injury when struck by motor vehicles.

A-21. The City of Lakewood's property is a finite resource.

II. CONCLUSIONS OF LAW

A-22. The proposed placement of newsracks on City property is a "taking" of property. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 37 Law. Ed. 380 (1893) and *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982).

A-23. A fixed retailer of First Amendment protected material is not the same as a person who travels door-to-door disseminating material, and a municipality need not treat them the same. *Murdock v. Pennsylvania*, 319 U.S. 105, 87 Law. Ed. 1292 (1943) and *Young v. American Mini Theatres*, *supra*.

A-24. A municipality may regulate the use of its finite resources. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 23 L. Ed. 2d 371 (1969).

A-25. Each method of communicating ideas is a law unto itself. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501, 69 L. Ed. 2d 800 (1981), *Kovacs v. Cooper*, 336 U.S. 77, 97, 93 Law Ed. 513 (1949).

A-26. To properly determine the validity of laws regulating a specific method of communication, the differing natures, values, abuses and dangers of the particular medium of communication must be considered. *Metromedia, Inc. v. San Diego*, *supra*, at 501, *Kovacs v. Cooper*, *supra*, at 97.

A-27. The City of Lakewood has the right to charge rent for the sale and exclusive use of its property by a private corporation. *City of St. Louis v. Western Union Telegraph*, *supra*, at 98-99 and 101-102.

A-28. First Amendment protected commercial speech may be regulated and the regulation will be valid if: (1) It seeks to implement a substantial governmental interest; (2) It directly advances that interest; and, (3) it reaches no further than necessary to accomplish the given objective. *Metromedia, Inc. v. San Diego*, *supra* 507.

A-29. Traffic safety, proper functioning of a City's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial governmental interests, and the subject ordinances reach no further than necessary to accomplish the City's objectives. *Metromedia, Inc. v. San Diego*, *supra*, at 508, O.R.C. § 723.01, *Dickerhoof v. Canton*, 6 Ohio St. 3d 128 (1983).

A-30. The plaintiff, a mere commercial user of the streets, cannot be properly placed in the same classification as tax paying property owners adjacent to the streets or the City, public transportation companies, public utility companies (telephone and electric) whose facilities in the right of way are directly for public health and safety purposes, e.g., emergency communications (free police and fire calls), shelter and protection from weather and flying street debris, street lighting, traffic lights and signage to direct and regulate traffic and plaintiff cannot claim a denial of equal protection by reason of any Lakewood regulations.

A-31. The plaintiff may not claim special exemption from charges for using city property, e.g., parking at park-

ing meters, or even charges for use of roadways such as turnpike tolls.

Respectfully submitted,

HENRY B. FISCHER

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER

& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

Telephone: (216) 781-1212

Attorneys for Defendant

City of Lakewood

**Proposed Findings of Fact and Conclusions of Law
of Defendant, City of Lakewood**

FINDINGS OF FACT

1. The City of Lakewood is a municipal corporation chartered under the Constitution and laws of the State of Ohio, including the "home rule" amendment of the Ohio Constitution, Article XVIII, Section 3.

2. The territory comprising the City of Lakewood is approximately 5.5 square miles and the City is an older residential community located in Cuyahoga County, Ohio west of the City of Cleveland (456 square miles), bordered by the City of Cleveland on the East and South, by Rocky River to the West, and by Lake Erie to the North.

3. The population of the City of Lakewood as measured by the census in 1980 was 61,963. The City of Lakewood has historically been a city of homes located four to six miles west of downtown Cleveland. The commercial areas of the City are located essentially along Madison and Detroit Avenues, east and west across the entire breadth of the City in close proximity and convenient to all residential areas of the City.

4. Installation of coin-operated newspaper vending devices on the streets of the City of Lakewood has never been permitted or customary.

5. Placement of coin-operated newspaper dispensing devices along a street will be an inducement for persons driving by to stop and purchase a newspaper, causing a traffic safety hazard and intrusions upon private drives. Erection of any device in the public right-of-way is a potential safety hazard.

6. The Plain Dealer Publishing Company is a corporation organized and existing under the laws of the State

of Ohio in the business of publishing and selling "The Plain Dealer" a daily newspaper which has an overage daily circulation of approximately 493,000, in general, and about 380,000 in Cuyahoga County, Ohio.

7. The Plain Dealer Publishing Company sales in a general sense are 77 percent by home delivery through paper boys, girls or adults and 80 percent on Sundays by home delivery, the balance of sales being by single copy sales through retail outlets and coin-operated vending boxes, the latter constituting 23 percent of single copy sales, or 4.6 to 5.29 percent of total sales.

8. With respect to week-day sales of papers, the Plain Dealer recommended price is 20 cents per paper of which the Plain Dealer receives 12 1/6 cents a copy from home delivery sales and 16 cents on single copy sales, the difference going to the retail outlet in the case of retail sales, and to the circulation personnel who places the papers in the vending machines, who must pay only the standard single copy price for the papers and gains any profit.

9. The Plain Dealer has free access to the streets and commercial enterprises of the City of Lakewood the same as others similarly situated for home delivery and single copy sales distribution including at least 75 outlets.

10. The Plain Dealer has been for some time available from at least 13 all-night business establishments and at least 12 coin-operated newspaper dispensing devices located on property owned other than by the City of Lakewood disbursed throughout the City and within walking distance of persons within the City of Lakewood on an all-night basis, 24 hours per day, round the clock, and 365 days per year.

11. The Plain Dealer through their circulation manager has refused to pay any thing to any owner of real

estate for the placement of their coin-operated newspaper dispensing devices.

12. The Cleveland Plain Dealer Publishing Company is willing and has modified the style and color of its newspaper dispensing devices to accommodate the establishments where they are placed and as an inducement for allowing the placement thereof at restaurants and other places owned other than by the City of Lakewood.

13. The City of Lakewood has for some time and continues to own all the streets in the City of Lakewood, as well as the tree lawns and sidewalks adjacent thereto in fee simple, and is otherwise authorized to regulate, license or prohibit the selling of goods, merchandise, or medicines on the street, has special power to regulate the use of the streets and has the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the municipal corporation, but must cause them to be kept open, in repair, and free from nuisance and is liable for injury caused by failure of such duty pursuant to Ohio Revised Code Sections 715.24 and 723.01.

14. Defendant's Exhibit "Z", is an exact copy of the Zoning Code of the City of Lakewood on file with the Clerk of Council and adopted by the City Council by Ordinance 77-82 including a zoning map which substantially reflects the actual uses of land in the City of Lakewood.

15. Prior to the filing of this case, the Plain Dealer requested permission to place coin-operated newspaper dispensing devices at sites within the city of Lakewood, including, along Clifton Boulevard on the corners of the intersections with Webb (SW), Summit (SE), Warren (SW), Bunts (SW), Nicholson (SW), Fry (SE), Thoreau

(SW), and Belle (SE) Streets; along Detroit Avenue at the corners of the intersections with Lincoln (SW), Cordova (SW), Westwood (SW), and Warren (NW and SW); and along Madison at the corners of the intersections with Warren (SW), Bunts (SW), and Lincoln (SW), and the Law Director replied to such request by letter on May 21, 1982, denying the requests of the Plain Dealer for permission to place commercial coin-operated newspaper dispensing devices along the streets of Lakewood, citing Section 901.18 which provided at that time as follows:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

16. The Plain Dealer filed suit in the within case eight (8) months later on January 5, 1983, attacking the constitutionality of the aforesaid Section 901.18 of the Lakewood Codified Ordinances and on or about August 18, 1983, the Court upon motion for summary judgment ruled such ordinance provision to be an unconstitutional exercise of police power finding that a reasonable means of newspaper distribution had been totally banned and determined to hold the matter for a permanent injunction for sixty days in order to give the City of Lakewood an opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with Plaintiff's First Amendment Rights.

17. Recognizing that the term "public property" includes more than the property owned by the City of Lakewood, i.e., it would include property of the Board of Education, the County, the State, the Federal Government,

etc., as well as privately held property dedicated for public uses, and the responsibility of the City of Lakewood to enforce its ordinances and assume its responsibility respecting the streets, ordinance 108-83 and 109-83 were adopted on October 17, 1983, copies of which ordinances are set forth respectively in joint Exhibit 1 and Joint Exhibit 2, wherein Section 901.18 was amended to permit erection of a structure on public property with the consent of the owner thereof where permitted by the statutes of the State of Ohio and the ordinances of the City of Lakewood, including, but not limited to zoning provisions, established that applications for rental agreements or permits for the exclusive use of public property owned by the City of Lakewood should be made to the City Council unless otherwise permitted by ordinance and established a procedure for applying to the Mayor for 901.181 as adopted by Ordinance 109-83, Joint Exhibit 2.

18. Several coin operated newspaper dispensing devices of the Plain Dealer have been located on public property, owned other than by the City, in the City of Lakewood for some time prior to October 17, 1983, and prior to passage of Ordinances 108.83 and 109.83, there was no enforcement for erection of such structures erected on such public property by the City of Lakewood.

19. The Answer of the City of Lakewood was amended in the within case to reflect the ordinance changes by Motion pursuant to Rule 15.

20. After enactment of the aforesaid ordinances, the Counsel for the Plain Dealer indicated dissatisfaction with certain provisions and a meeting was arranged to go over their objections after which upon further study and consultation with officials of the City of Lakewood, Section 901.181 was amended in response to the Plain Dealer com-

plaints by ordinance 2-84, adopted on January 3, 1984, a true copy of which is set forth in Joint Exhibit 3, and Joint Exhibit 4 sets forth Section 901.181 as adopted by Ordinance 109-83 and amended by Ordinance 2-84 in composite.

21. The provisions of new Section 901.181 as amended and set forth in Joint Exhibit 4 mandate that the Mayor permit installation of coin-operated newspaper dispensing devices upon application, payment of a \$10.00 rental fee for each site, provision of a certificate of insurance showing the City of Lakewood as a named insured for liability for any injury respecting use of property of the City of Lakewood, at locations permitted by the terms of such section and in accordance with the provisions of such section, subject only to the Architectural Review respecting appearance and architectural standards under Chapter 1325 of the Codified Ordinances.

22. The regulations of Section 901.181 as amended permit location of the coin-operated newspaper dispensing devices at all locations requested on Madison and Detroit Avenues in the commercial district upon compliance with the provisions of the section, but not along Clifton Boulevard at the sites requested, all of which lie in residential use districts, to wit: In an R-2 (single and two family residential use district), at Webb, Summit, Bunts, Thoreau, and Belle; M-1 or low rise apartments at Warren; and M-2 or high rise apartments at Fry.

23. The Plaintiff Cleveland Plain Dealer has not made any application for a rental permit in any form whatsoever for the use and occupation of City of Lakewood owned real estate for erecting commercial coin-operated newspaper dispensing devices.

24. The City of Lakewood by its Mayor stand ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City as mandated by Codified Ordinance Section 901.181 along Madison and Detroit Avenues at the above stated locations.

25. As most homes, buildings and other structures within the City of Lakewood are over 50 years of age, the City of Lakewood has begun an aggressive campaign for upgrading the buildings and homes within the City.

26. Pursuant to the above campaign, plans for all structures newly built or remodeled (including those structures built or remodeled by the City itself) must be submitted to the Architectural Board of Review pursuant to Section 1325.04 of the Codified Ordinances, as amended, effective June 15, 1981.

27. The location of a newspaper dispensing device on a portion of property effectively excludes all others from using that property.

28. The placement of a newspaper dispensing device on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years.

29. The Plain Dealer currently furnishes other municipalities, at its expense, liability insurance protecting those municipalities from liability arising from the placement, maintenance and/or operation of such devices in their municipality.

30. The Plain Dealer currently has filed Certificates of Insurance covering its newspaper dispensing devices for bodily injury and/or property damage, in the amount of One Million Dollars (\$1,000,000.00), and naming as additional insureds: City of Willoughby; City of South Euclid;

City of Parma Heights; City of Parma; City of North Olmsted; City of Maple Heights; City of Fairview Park; City of Euclid; City of Cleveland; City of Bay Village; and, City of Strongsville, copies of which are provided as Defendant's Exhibit "GG".

31. The main function of the newspaper dispensing device is to solicit sales of the Plain Dealer newspaper.

32. The newspaper dispensing devices serve as an advertising benefit to the Plain Dealer as the Plain Dealer's name is conspicuously present on all such devices.

CONCLUSION OF LAW

33. No property rights to use the properties of others including the City of Lakewood is created or granted by either the First or Fourteenth Amendments to the U.S. Constitution inuring to the benefit of the Plain Dealer. *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Bishop v. Wood*, 426 U.S. 341 (1976).

34. The City of Lakewood has no obligation under the Constitution and laws of the United States or otherwise mandating that it permit the exclusive use of City of Lakewood real estate for private purposes, commercial or otherwise, to the exclusion of all other members of the public. *Board of Regents v. Roth*, *supra*, *Bishop v. Wood*, *supra*.

35. The City of Lakewood is mandated by Ohio Revised Code Section 723.01 to maintain the streets, sidewalks, and public ways open to the public free of nuisance, is held civilly liable by such Section for failure of such duty, and its broad discretion should not be bridled nor should it be exposed to additional liability without indemnification by any private commercial use on such City owned property by Plaintiff or otherwise. *Haverlack v.*

Portage Homes, Inc., 2 Ohio St. 3d 26 (1982); *Dickerhoof v. Canton*, 6 Ohio St. 3d 128 (1983), *Associated Press v. NLRB*, 301 U.S. 103 (1936).

36. The Fourteenth Amendment to the U.S. Constitution, the Charter of the City of Lakewood, the Ohio Constitution and the laws of the State of Ohio require that the City of Lakewood hold its property in a fiduciary capacity for the benefit of all citizens and taxpayers of the City and forbid allowing property so held to be exclusively used by any person, firm or corporation for private purposes, thereby denying equal protection to other citizens, unless such City property is not at any time needed for municipal purposes and the City receives fair and just compensation therefor. See cites after paragraph 43.

37. Plaintiff's commercial use of property is subject to reasonable zoning ordinances, the same as bookstores, theatres, places of public assembly and other commercial uses, whether of the "First Amendment" classification or otherwise, and the Fourteenth Amendment of the U.S. Constitution mandates equal protection for all such uses. *Young v. Mini Theatres*, 427 U.S. 50 (1976), *Associated Press v. NLRB*, *supra*, *Murdock v. Pennsylvania*, 319 U.S. 105, *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

38. Section 901.181 is presently constituted is a reasonable and constitutional enactment for the protection of property rights of persons and entities owning public property including the City of Lakewood. *Kash Enterprises, Inc. v. City of Los Angeles*, 562 P. 2d 1302 (1977), *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 74 L.Ed.2d 794 (1983), *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748 (1976).

39. The streets and highways of the City of Lakewood are not a public forum for the permanent erection of signs and devices for the dispensing of printed material for private purposes, whether for advertising purposes or otherwise and whether for commercial purposes or otherwise. *United States Postal Service v. Council of Greenboro Civic Associations*, 453 U.S. 114 (1981).

40. The publisher of a newspaper has no special immunity from the application of general laws and has no special privileges to invade the rights of others. *Associated Press v. NLRB*, *supra*.

41. The erection of a coin-operated newspaper dispensing device for the sale of newspapers at a particular site constitutes a commercial use at such site. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Young v. Mini Theatres*, *supra*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

42. Prohibition of rental for use of coin-operated newspaper dispensing devices with commercial advertising thereon in the public right of way of streets located in residential use districts is a reasonable and constitutional regulation for the preservation of open spaces and a City may not constitutionally permit use of public property, whether privately owned or owned by the State or any agency thereof, located in a residential use district to be leased or otherwise exclusively used for private commercial purposes and this applies to all streets or portions thereof located in residential use districts in the City of Lakewood, including Clifton Boulevard. *Metromedia, Inc. v. San Diego*, *supra*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

43. The City of Lakewood holds public property in trust for the citizens of the City of Lakewood and may not permit private persons to exclusively use such property without adequate consideration including streets which have been held in trust for the use of the public and part of the privileges, rights, and liberties of citizens. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), *Gilbert v. Dayton*, (App. 1944) 42 O.L.Abs. 193, 59 N.E.2d 454, *Hugger v. Ironton*, (1947) 83 O.App. 21, 38 O.O. 130 cert. den., 148 O.S. 670; O.R.C. Section 733.56.

44. The provisions of Chapter 1325.04 providing for architectural review to all erection of structures or construction wheresoever situated within the City, including construction by the City, mandates that coin-operated newspaper dispensing devices be subject to architectural review the same as erection of any other structure and exemption of newspaper dispensing devices would constitute discrimination and a denial of equal protection to all others erecting structures and doing construction in the City of Lakewood. 14th Amendment to U.S. Constitution, *Young v. Mini Theatres*, *supra*, *Associated Press v. NLRB*, *supra*.

45. Since the City of Lakewood is liable for nuisances in the public right of way pursuant to Section 723.01 of the Ohio Revised Code, it is not unreasonable to require indemnification and securing of insurance, including the City of Lakewood as an additional named, insured by persons permitted to use portions of the street right of way for private purposes. *Young v. Mini Theatres*, *supra*, *Associated Press v. NLRB*, *supra*.

46. The charge of \$10.00 per site per year for location of a newspaper dispensing device is a reasonable charge for private use of public lands taking into account the

rental value of the property in the City of Lakewood and the administrative expense involved in regulating the placement of coin-operated newspaper dispensing devices. *City of St. Louis v. Western Union Telegraph Co.*, *supra*.

47. The regulation and terms of permit provided by Section 901.181 of the Codified Ordinances of the City of Lakewood as presently constituted are reasonable terms for the rental of public property for private use and such terms are also reasonable in the exercise of the responsibility of the City of Lakewood to keep the right of way free of nuisances as mandated by Ohio Revised Code Section 723.01. *Associated Press v. NLRB*, *supra*; *Young v. American Mini Theatres*, *supra*; *Metromedia, Inc. v. San Diego*, *supra*; *City of St. Louis v. Western Union Telegraph Co.*, *supra*; *Red Lion Broadcasting v. F.C.C.*, *supra*; *Village of Belle Terre v. Boraas*, *supra*.

48. Application and appeal pursuant to the provisions of Lakewood Codified Ordinance Section 901.181 and Ohio Revised Code Chapter 2506 provides an adequate remedy to redress any claimed wrong alleged by the Plaintiff, Plain Dealer Publishing Company. *Parratt v. Taylor*, (1981) 451 U.S. 527; *Vicory v. Walton*, (6th Cir., 1983) 721 F. 2d 1062.

49. The provisions of the Lakewood Codified Ordinance Sections 901.18 and 901.181 as presently constituted also constitute a proper exercise of police power in harmony with the zoning regulation and are otherwise valid time, manner and place regulations under circumstances wherein the Plaintiff Plain Dealer Publishing Company has other adequate alternate channels of communication without using any property of the City of Lakewood and there are no other less intrusive means available for reg-

ulating the placement of the coin-operated newspaper dispensing devices short of sacrificing open spaces in residential neighborhoods and generally jeopardizing the health, safety and welfare of the public. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, *supra*; *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*; *Red Lion Broadcasting Co. v. F.C.C.*, *supra*; *Young v. Mini Theatres*, *supra*; *Associated Press v. NLRB*, *supra*; *Metromedia, Inc. v. San Diego*, *supra*; *Village of Belle Terre v. Boraas*, *supra*; *Euclid v. Ambler Realty Co.*, *supra*; *Heffron, et al. v. International Society for Krishna Consciousness, Inc.*, et al., 452 U.S. 640 (1981).

50. The complaint of the Plain Dealer Publishing Company should be dismissed and denied.

Respectfully submitted,

HENRY B. FISCHER

WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY

1215 Terminal Tower
Cleveland, Ohio 44114
(216) 781-1212

Attorney for Defendant
City of Lakewood, Ohio

C83-63

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.,
Plaintiff,
vs.
CITY OF LAKEWOOD,
Defendant.

JUDGMENT ENTRY

(Filed July 10, 1984)

Note: The Judgment-Entry of the United States District Court is printed in the Jurisdictional Statement at page A24.

No. C83-63

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.,
Plaintiff,
vs.
CITY OF LAKEWOOD,
Defendant.

MEMORANDUM AND ORDER

(Filed July 12, 1984)

This is an action arising under the Civil Rights Act of 1871, 42 U.S.C. §1983. The case came on for trial and the Court having heard the testimony of witnesses, having examined the exhibits, and having reviewed the post trial memorandum of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Plain Dealer Publishing Company is an Ohio Corporation which publishes The Plain Dealer, a newspaper of general circulation throughout the Cleveland metropolitan area and Ohio.

2. The City of Lakewood is a municipal corporation chartered under the Constitution and laws of the State of Ohio, including the "home rule" amendment of the Ohio Constitution, Article XVIII, §3.

3. The territory comprising the City of Lakewood is approximately 5.5 square miles and the City is an older residential community located in Cuyahoga County, Ohio west of the City of Cleveland (456 square miles), bordered by the City of Cleveland on the East and South, by Rocky River to the West, and by Lake Erie to the North.

4. The population of the City of Lakewood as measured by the census in 1980 was 61,963. The City of Lakewood has historically been a city of homes, located four to six miles west of downtown Cleveland. The commercial areas of the City are located essentially along Madison and Detroit Avenues, east and west across the entire breadth of the City in close proximity and convenient to all residential areas of the City.

5. There is no stopping permitted along Clifton Boulevard located in a residentially zoned use district in the morning hours at the very time that the Plaintiff is attempting to sell its newspapers along said street, which would induce traffic to stop for the purchase of same and cause accidents in the opinion of Captain Glenn Walker.

6. The Plain Dealer Publishing Company sales in a general sense are 77 percent by home delivery through junior carriers or adults and 80 percent on Sundays by home delivery, the balance of sales being by single copy sales through retail outlets and coin-operated vending boxes, the latter constituting 23 percent of single copy sales, or 4.6 to 5.29 percent of total sales.

7. With respect to week-day sales of papers, the Plain Dealer suggested price is 20 cents per paper of which the Plain Dealer receives 12 1/6 cents a copy from home delivery sales and 16 cents on single copy sales, the difference going to the retail outlet in the case of retail sales, and to the circulation personnel who places the

papers in the vending machines, who must pay only the standard single copy price for the papers and gains any profit.

8. There is no area within the City of Lakewood more than one quarter mile from an all night newspaper outlet, i.e., stores open all night or newspaper dispensing boxes located on property owned other than by the City of Lakewood.

9. The City of Lakewood has for some time and continues to own all the streets in the City of Lakewood, as well as the tree lawns and sidewalks adjacent thereto in fee simple, and is otherwise authorized to regulate, license or prohibit the selling of goods, merchandise, or medicines on the street, has special power to regulate the use of the streets and has the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aquaducts and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance and is liable for injury caused by failure of such duty pursuant to Ohio Revised Code §§715.24 and 723.01.

10. Defendant's Exhibit "Z", is an exact copy of the Zoning Code of the City of Lakewood on file with the Clerk of Council and adopted by the City Council by Ordinance 77-82 including a zoning map which substantially reflects the actual uses of land in the City of Lakewood.

11. Prior to the filing of this case, the Plain Dealer inquired about placing coin-operated newspaper dispensing devices at sites within the City of Lakewood, including, along Clifton Boulevard on the corners of the intersections with Webb (SW), Summit (SE), Warren (SW), Bunts (SW), Nicholson (SW), Fry (SE), Thoreau (SW), and

Belle (SE) Streets; along Detroit Avenue at the corners of the intersections with Lincoln (SW), Cordova (SW), Westwood (SW), and Warren (NW and SW); and along Madison at the corners of the intersections with Warren (SW), Bunts (SW), and Lincoln (SW), and the Law Director replied to such request by letter on May 21, 1982, denying the requests of the Plain Dealer for permission to place commercial coin-operated newspaper dispensing devices along the streets of Lakewood, citing §901.18 which provided at the time as follows:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

12. The Plain Dealer filed suit in the within case eight (8) months later on January 5, 1983, attacking the constitutionality of the aforesaid §901.18 of the Lakewood Codified Ordinances and on or about August 18, 1983, the Court upon motion for summary judgment ruled such ordinance provision to be an unconstitutional exercise of police power, finding that a reasonable means of newspaper distribution had been totally banned and determined to hold the matter for a permanent injunction for sixty (60) days in order to give the City of Lakewood an opportunity to enact reasonable regulations concerning placement of newspaper boxes on public property that do not interfere with Plaintiff's First Amendment Rights.

13. Recognizing that the term "public property" includes more than the property owned by the City of Lakewood, i.e., it would include property of the Board

of Education, the County, the State, the Federal Government, etc., as well as privately held property dedicated for public uses, and the responsibility of the City of Lakewood to enforce its ordinances and assume its responsibility respecting the streets, ordinance 108.83 and 109.83 were adopted on October 17, 1983, copies of which ordinances are set forth respectively in Joint Exhibit 1 and Joint Exhibit 2, wherein §901.18 was amended to permit erection of a structure on public property with the consent of the owner thereof where permitted by the statutes of the State of Ohio and the ordinances of the City of Lakewood, including, but not limited to zoning provisions, established that applications for rental agreements or permits for the exclusive use of public property owned by the City of Lakewood should be made to the City Council unless otherwise permitted by ordinance and established a procedure for applying to the Mayor for §901.181 as adopted by Ordinance 109-83, Joint Exhibit 2.

14. After enactment of the aforesaid ordinances, the Counsel for the Plain Dealer indicated dissatisfaction with certain provisions and a meeting was arranged to go over their objections after which upon further study and consultation with officials of the City of Lakewood, §901.181 was amended in response to the Plain Dealer complaints by ordinance 2-84, adopted on January 3, 1984, a true copy of which is set forth in Joint Exhibit 3, and Joint Exhibit 4 sets forth §901.181 as adopted by Ordinance 109.83 and amended by Ordinance 2-84 in composite.

15. The provisions of new §901.181 as amended and set forth in Joint Exhibit 4 mandate that the Mayor permit installation of coin-operated newspaper dispensing devices upon application, payment of a \$10.00 rental fee for each site, provision of a certificate of insurance showing the City of Lakewood as a named insured for liability for any

injury respecting use of property of the City of Lakewood, at locations permitted by the terms of such section and in accordance with the provisions of such section, subject only to the Architectural Review respecting appearance and architectural standards under Chapter 1325 of the Codified Ordinances.

16. The regulations of §901.181 as amended permit location of the coin-operated newspaper dispensing devices at all locations requested on Madison and Detroit Avenues in the commercial district upon compliance with the provisions of the section, but not along Clifton Boulevard at the sites requested, all of which lie in residential use districts, to-wit: In an R-2 (single and two family residential use district), at Webb, Summit, Bunts, Thoreau, and Belle; M-1 or low rise apartments at Warren; and M-2 or high rise apartments at Fry.

17. The Plaintiff Cleveland Plain Dealer has not made any application for a rental permit in any form whatsoever for the use and occupation of City of Lakewood owned real estate for erecting commercial coin-operated newspaper dispensing devices.

18. The City of Lakewood by its Mayor stand ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City as mandated by Codified Ordinance §901.181 along Madison and Detroit Avenues at the above stated locations.

19. The placement of a newspaper dispensing device on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years.

20. The main function of the newspaper dispensing device is to distribute the Plain Dealer newspaper.

21. The newspaper dispensing devices serve as an advertising benefit to the Plain Dealer as the Plain Dealer's name is conspicuously present on all such devices.

22. Use of the tree lawns and sidewalks adjacent to the streets by the City of Lakewood is limited only to accessory uses relating to the health and safety of the public using the streets or located along such street, e.g., telephone poles, lines, boxes, and stations are necessary for free emergency calls from the right of way as well as from the residents and occupants along the streets; electric poles and facilities are necessary to provide light for the streets and operation of traffic lights; and bus shelters are necessary for the health of the citizens and for protecting them while they wait for public transportation. Newspaper boxes have no health or safety purpose in the public right of way and are there only for the convenience of the Plain Dealer to sell to its customers.

23. The two hundred fifty foot (250) distancing requirement of the Lakewood Ordinances permits a newspaper to locate one or two newspaper boxes at every block.

24. It is uncontroverted that the distancing limitations of §901.181 allow location of the Plaintiff's newspaper dispensing boxes at every site which they selected.

25. The allocation of the non-residential areas, the BR (Business Residential), B1 (Office) and X (Industrial) areas of the City include the entire breadth of the City along Madison and Detroit Avenues, several streets in the Southeast sector of the City, over half of the area along West 117th Street, an area adjacent to Warren Road in the southern central portion of the City and an area along West Clifton and Sloane Avenues in the western portion of the City as shown by the zoning map of De-

fendant's Exhibit "Z", which in addition to the non-City owned property sites, provide more than adequate sites for placement of newspaper dispensing boxes along the streets of the City of Lakewood, which sites are all in close proximity to the homes and business in the City of Lakewood. The only reason why the Plaintiff has not placed newspaper dispensing devices along the streets of Lakewood where permitted, is that the Plaintiff has not applied for such use.

26. The provisions of §901.181 are the least restrictive regulations for placement of newsboxes along the streets of Lakewood; site selection is not restricted specifically, e.g., in handicapped ramps or so as to restrict egress from parked vehicles, for every conceivable proper reason.

27. Given the availability of outlets and make up of the City of Lakewood, it is poor City planning to permit newspaper dispensing devices along the streets, especially since placement of anything in such areas increase the probability for accidents and injury.

28. The City of Lakewood's property is a finite resource.

CONCLUSIONS OF LAW

1. No property rights to use the properties of others including the City of Lakewood is created or granted by either the First or Fourteenth Amendments to the United States Constitution inuring to the benefit of the Plain Dealer. *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Bishop v. Wood*, 426 U.S. 341 (1976).

2. The proposed placement of newsracks on City property is a "taking" of property. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 37 L. Ed. 380

(1893) and *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419, 73 L.Ed. 2d 868 (1982).

3. The City of Lakewood has no obligation under the Constitution and laws of the United States or otherwise mandating that it permit the exclusive use of City of Lakewood real estate for private purposes, commercial or otherwise, to the exclusion of all other members of the public. *Board of Regents v. Roth*, *supra*; *Bishop v. Wood*, *supra*.

4. The City of Lakewood is mandated by Ohio Revised Code §723.01 to maintain the streets, sidewalks, and public ways open to the public free of nuisance, is held civilly liable by such Section for failure of such duty, and its broad discretion should not be bridled nor should it be exposed to additional liability without indemnification by any private commercial use on such City owned property by Plaintiff or otherwise. *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26 (1982); *Dickerhoof v. Canton*, 6 Ohio St. 3d 128 (1983), *Associated Press v. NLRB*, 301 U.S. 103 (1936).

5. A municipality may regulate the use of the finite resources. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 23 L.Ed. 2d 371 (1969).

6. The Fourteenth Amendment to the U.S. Constitution, the Charter of the City of Lakewood, the Ohio Constitution and the law of the State of Ohio require that the City of Lakewood hold its property in a fiduciary capacity for the benefit of all citizens and taxpayers of the City and forbid allowing property so held to be exclusively used by any person, firm or corporation for private purposes, thereby denying equal protection to other citizens, unless such City property is not at any time needed

for municipal purposes and the City receives fair and just compensation therefor. See cites after paragraph 13.

7. Plaintiff's commercial use of property is subject to reasonable zoning ordinances, the same as bookstores, theatres, places of public assembly and other commercial uses, whether of the "First Amendment" classification or otherwise, and the Fourteenth Amendment of the U.S. Constitution mandates equal protection for all such uses. *Young v. Mini Theatres*, 427 U.S. 50 (1976), *Associated Press v. NLRB*, *supra*, *Murdock v. Pennsylvania*, 319 U.S. 105, (1943), *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

8. Section 901.181 as presently constituted is a reasonable and constitutional enactment for the protection of property rights of persons and entities owning public property including the City of Lakewood. *Kash Enterprises, Inc. v. City of Los Angeles*, 562 P. 2d 1302 (1977), *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 103 S.Ct. 948, 74 L.Ed. 2d 794 (1983), *Red Lion Broadcasting Co. v. F.C.C.*, *supra*, *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748 (1976).

9. The streets and highways of the City of Lakewood are not a public forum for the permanent erection of signs and devices for the dispensing of printed material for private purposes, whether for advertising purposes or otherwise and whether for commercial purposes or otherwise. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

10. The publisher of a newspaper has no special immunity from the application of general laws and has no special privileges to invade the rights of others. *Associated Press v. NLRB*, *supra*.

11. The erection of a coin-operated newspaper dispensing device for the sale of newspapers at a particular site constitutes a commercial use at such site. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Young v. Mini Theatres*, *supra*, *Murdock v. Pennsylvania*, *supra*.

12. Prohibition of rental for use of coin-operated newspaper dispensing devices with commercial advertising thereon in the public right of way of streets located in residential use districts is a reasonable and constitutional regulation for the preservation of open spaces and a City may not constitutionally permit use of public property, whether privately owned or owned by the State or any agency thereof, located in a residential use district to be leased or otherwise exclusively used for private commercial purposes and this applies to all streets or portions thereof located in residential use districts in the City of Lakewood, including Clifton Boulevard. *Metromedia, Inc. v. San Diego*, *supra*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

13. The City of Lakewood holds public property in trust for the citizens of the City of Lakewood and may not permit private persons to exclusively use such property without adequate consideration including streets which have been held in trust for the use of the public and part of the privileges, rights, and liberties of citizens. *City of St. Louis v. Western Union Telegraph Co.*, *supra*, *Gilbert v. Dayton*, (App. 1944) 42 O.L.Abs. 193, 59 N.E.2d 454, *Hugger v. Iron-ton*, (1947) 83 O.App. 21, 38 O.O. 130 cert. denied, 148 O.S. 670; O.R.C. §733.56.

14. The provisions of Chapter 1325.04 providing for architectural review to all erection of structures or construction wheresoever situated within the City, including

construction by the City, mandates that coin-operated newspaper dispensing devices be subject to architectural review the same as erection of any other structure and exemption of newspaper dispensing devices would constitute discrimination and a denial of equal protection to all others erecting structures and doing construction in the City of Lakewood. Fourteenth Amendment to U.S. Constitution, *Young v. Mini Theatres, supra*, *Associated Press v. NLRB, supra*.

15. Since the City of Lakewood is liable for nuisances in the public right of way pursuant to §723.01 of the Ohio Revised Code, it is not unreasonable to require indemnification and securing of insurance, including the City of Lakewood as an additional named insured by persons permitted to use portions of the street right of way for private purposes. *Young v. Mini Theatres, supra*, *Associated Press v. NLRB, supra*.

16. The charge of \$10.00 per site per year for location of a newspaper dispensing device is a reasonable charge for private use of public lands taking into account the rental value of the property in the City of Lakewood and the administrative expense involved in regulating the placement of coin-operated newspaper dispensing devices. *City of St. Louis v. Western Union Telegraph Co., supra*.

17. The regulations and terms of permit provided by §901.181 of the Codified Ordinances of the City of Lakewood as presently constituted are reasonable terms for the rental of public property for private use and such terms are also reasonable in the exercise of the responsibility of the City of Lakewood to keep the right of way free of nuisances as mandated by Ohio Revised Code §723.01. *Associated Press v. NLRB, supra*; *Young v. American Mini Theatres, supra*; *Metromedia, Inc. v. San Diego, supra*; *City of St. Louis v. Western Union Telegraph Co.,*

supra; *Red Lion Broadcasting v. F.C.C., supra*; *Village of Belle Terre v. Boraas, supra*.

18. Application and appeal pursuant to the provisions of Lakewood Codified Ordinance §901.181 and Ohio Revised Code Chapter 2506 provides an adequate remedy to redress any claimed wrong alleged by the Plaintiff, Plain Dealer Publishing Company. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983).

19. The provisions of the Lakewood Codified Ordinance §901.18 and §901.181 as presently constituted also constitute a proper exercise of police power in harmony with the zoning regulation and are otherwise valid time, manner and place regulations under circumstances wherein the Plaintiff Plain Dealer Publishing Company has other adequate alternate channels of communication without using any property of the City of Lakewood and there are no other less intrusive means available for regulating the placement of the coin-operated newspaper dispensing devices short of sacrificing open spaces in residential neighborhoods and generally jeopardizing the health, safety and welfare of the public. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n, supra*, *Va. Pharmacy Bd. v. Va. Consumer Council, supra*; *Red Lion Broadcasting Co. v. F.C.C., supra*; *Young v. Mini Theatres, supra*; *Associated Press v. NLRB, supra*, *Metromedia, Inc. v. San Diego, supra*; *Village of Belle Terre v. Boraas, supra*, *Euclid v. Ambler Realty Co., supra*, *Heffron, et al. v. International Society of Krishna Consciousness, Inc., et al.*, 452 U.S. 640 (1981).

20. A fixed retailer of First Amendment protected material is not the same as a person who travels door-to-door disseminating material, and a municipality need not treat them the same. *Murdock v. Pennsylvania, supra*, and *Young v. American Mini Theatres, supra*.

21. To properly determine the validity of laws regulating a specific method of communication, the differing natures, values, abuses and dangers of the particular medium communication must be considered. *Metromedia, Inc. v. San Diego, supra*, at 501, *Kovacs v. Cooper, supra*, at 97.

22. First Amendment protected commercial speech may be regulated and the regulation will be valid if: (1) It seeks to implement a substantial government interest; (2) It directly advances that interest; and, (3) it reaches no further than necessary to accomplish the given objective. *Metromedia, Inc. v. San Diego, supra* 507.

23. Traffic safety, proper functioning of a City's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial government interests; and the subject ordinances reach no further than necessary to accomplish the City's objectives. *Metromedia, Inc. v. San Diego, supra*, at 508, O.R.C. §723.01, *Dickerhoof v. Canton, supra*.

24. The plaintiff, a mere commercial user of the streets, cannot be properly placed in the same classification as tax paying property owners adjacent to the streets or the City, public transportation companies, public utility companies (telephone and electric) whose facilities in the right of way are directly for public health and safety purposes, e.g., emergency communications (free police and fire calls), shelter and protection from weather and flying street debris, street lighting, traffic lights and signs to direct and regulate traffic and plaintiff cannot claim a denial of equal protection by reason of any Lakewood regulations.

25. The plaintiff may not claim special exemption from charges for using city property, e.g., parking at park-

ing meters, or even charges for use of roadways such as turnpike tolls.

26. Accordingly, judgment is for Defendant. Defendant to pay costs.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

No. 83-63

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PLAIN DEALER PUBLISHING CO.

Plaintiff,

v.

CITY OF LAKEWOOD,

Defendant.

ORDER

(Filed July 19, 1984)

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the defendant and against the plaintiff. Plaintiff's complaint is hereby dismissed at defendant's costs.

/s/ GEORGE W. WHITE
U. S. District Judge

No. C83-63

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

NOTICE OF APPEAL

(Filed August 14, 1984)

Notice is hereby given that The Plain Dealer Publishing Company, plaintiff in the above captioned action, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 19th day of July, 1984.

JAMES P. GARNER

RICHARD R. HOLLINGTON

KAREN B. NEWBORN

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

Nos. 84-3683 & 84-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLAIN DEALER PUBLISHING CO.,
Plaintiff-Appellant,
Cross-Appellee,

vs.

CITY OF LAKEWOOD,
Defendant-Appellee,
Cross-Appellant.

OPINION

(Filed July 10, 1986)

Note: The Opinion of the United States Court of Appeals for the Sixth Circuit is printed in the Jurisdictional Statement at page A1.

JOINT APPENDIX

VOL. (I I

No. 86-1042

Supreme Court, U.S.
FILED

MAY 16 1987

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986 :

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**JOINT APPENDIX
Volume II (Exhibits)**

JAMES P. GARNER

Counsel of Record

KAREN B. NEWBORN

DAVID L. MARBURGER

BAKER & HOSTETLER

3200 National City

Center

Cleveland, Ohio 44114

(216) 621-0200

Attorneys for Appellee

Plain Dealer

Publishing Company

HENRY B. FISCHER

Counsel of Record

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER

& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

(216) 781-1212

WILLIAM E. BLACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

City of Lakewood

12650 Detroit Avenue

Lakewood, Ohio 44107

(216) 521-6580

Attorneys for Appellant

City of Lakewood

Jurisdictional Statement Filed December 23, 1986

Jurisdiction Noted on March 2, 1987

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Robert Thrasher—

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PLAINTIFF'S EXHIBIT 2

CITY OF LAKEWOOD

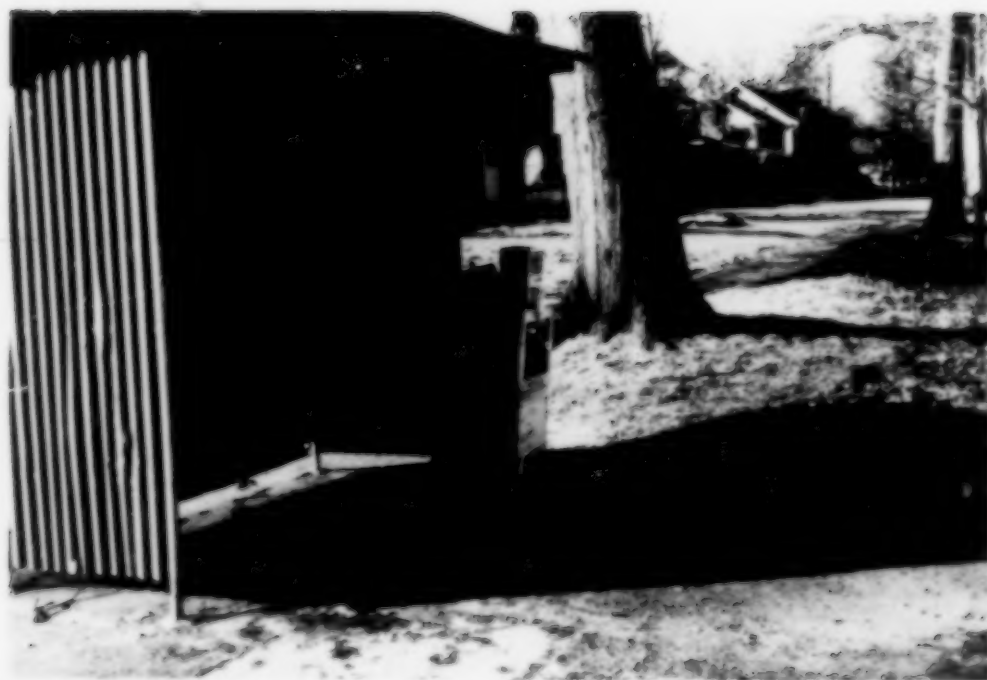
Locations with bus shelters

Clifton & Webb	S. W. Corner
Clifton & Summit	S. E. Corner
Clifton & Warren	S. W. Corner
Clifton & Bunts	S. W. Corner
Clifton & Nicholson	S. W. Corner
Clifton & Fry	S. E. Corner
Clifton & Thoreau	S. W. Corner
Clifton & Belle	S. E. Corner
Detroit & Lincoln	S. W. Corner
Madison & Warren	S. W. Corner
Madison & Bunts	S. W. Corner
Madison & Lincoln	S. W. Corner

Locations without bus shelters

Detroit & Cordova	S. W. Corner
Detroit & Westwood	S. W. Corner
Detroit & Warren	N. W. Corner
Detroit & Warren	S. W. Corner

PLAINTIFF'S EXHIBIT 3



PLAINTIFF'S EXHIBIT 4



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PLAINTIFF'S EXHIBIT 5



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PLAINTIFF'S EXHIBIT 6



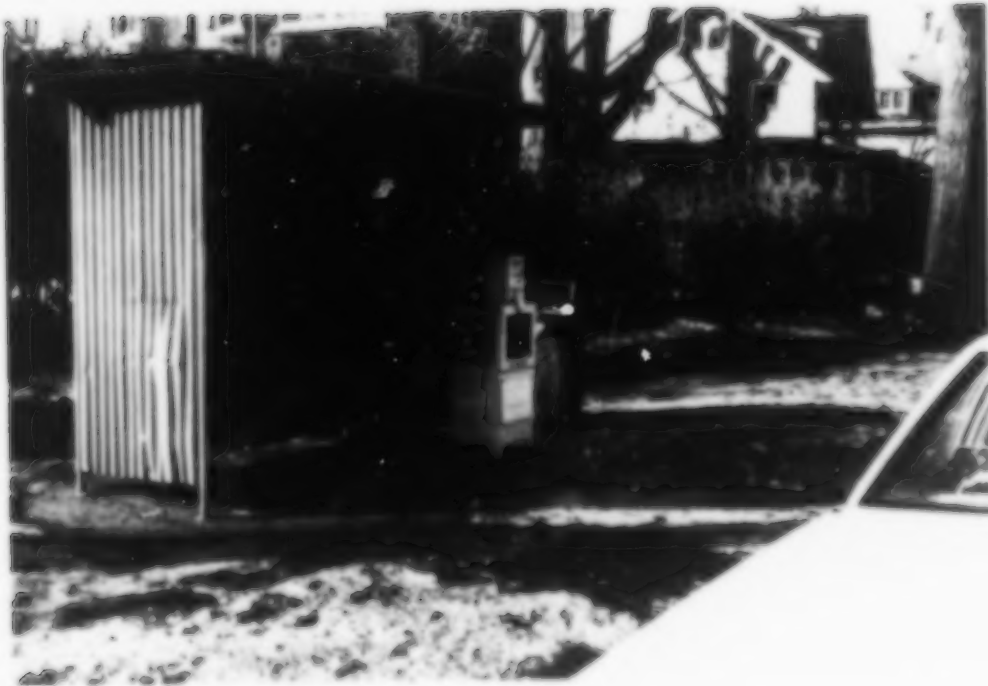
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PLAINTIFF'S EXHIBIT 8



PLAINTIFF'S EXHIBIT 9



PLAINTIFF'S EXHIBIT 10



PLAINTIFF'S EXHIBIT 11



PLAINTIFF'S EXHIBIT 13



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PLAINTIFF'S EXHIBIT 15



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PLAINTIFF'S EXHIBIT 17



PLAINTIFF'S EXHIBIT 19

Week Ending	Gross Copies	Returns	Returns Per Rack Per Day	Net Sale	Potential Cash	Actual Cash	Percent	No. Racks	Average Per Rack Per Day
9/ 4/83	162,899	25,892	4.8	137,007	\$27,401.40	\$21,325.05	77.8%	892	25.6
9/11/83	158,108	26,537	5.0	131,571	26,314.20	20,348.94	77.3%	895	24.5 Labor Day
9/18/83	171,096	29,672	5.5	141,424	28,284.80	21,943.90	77.6%	894	26.4
9/25/83	174,108	34,100	6.3	140,008	28,001.60	21,497.99	76.8%	897	26.0
10/ 2/83	176,659	32,702	6.0	143,957	28,791.40	22,024.44	76.5%	907	26.5
10/ 9/83	177,342	35,782	6.5	141,560	28,312.00	21,575.50	76.2%	915	25.8
10/16/83	176,122	34,985	6.4	141,137	28,227.40	21,681.21	76.8%	915	25.7
10/23/83	178,661	35,758	6.5	142,903	28,580.60	21,898.74	76.6%	916	26.0
10/30/83	177,762	35,767	6.5	141,995	28,399.00	21,820.91	76.8%	921	25.7
11/6/83	175,872	37,656	6.8	138,216	27,643.20	20,990.70	75.9%	929	24.8
11/13/83	177,392	41,225	7.4	136,167	27,233.40	20,528.99	75.4%	935	24.3 Vet. Day
11/20/83	176,445	40,392	7.0	136,053	27,210.60	20,472.64	75.2%	964	23.5
11/27/83	158,371	42,568	7.4	115,803	23,160.60	17,330.78	74.8%	956	20.2 Thanksgiving
12/ 4/83	174,019	36,996	6.4	137,023	27,404.60	20,508.25	74.8%	958	23.8
12/11/83	172,775	39,688	6.9	133,087	26,617.40	19,913.69	74.8%	957	23.2
12/18/83	175,492	39,029	6.7	136,463	27,292.60	20,353.75	74.6%	969	23.5
12/25/83	153,370	50,892	10.0	102,478	20,495.60	15,326.46	74.8%	851	20.1 Xmas

To get daily average divide Net Sale by day
 9/11/83 131,571 ÷ 6 = 21,928.5 copies per day.

= 24.8% of Single Copy Sales

PLAINTIFFS EXHIBIT 20
CLEVELAND PLAIN DEALER
Monthly Comparison Circulation Statement

MONTH OF SEPTEMBER - 1983

DAILY	MONTHLY TOTAL	AVERAGE THIS YEAR	AVERAGE LAST YEAR	GAIN OR LOSS	PERCENTAGE
EMPLOYEES	48,096	1,850	1,889	L- 39	2.1
CITY & SUBURBAN SCHOOLS	20,560	791	798	L- 7	0
RITZ & ALL OTHER SCHOOLS	14,933	574	553	G- 21	3.8
CARRIER-CITY & SUBURBAN	8,335,074	320,580	322,739	L- 2,159	.7
STORE SALES - CITY & SUBURBAN	2,187,048	84,117	84,182	L- 65	.1
DOWNTOWN SALES	324,484	12,480	12,950	L- 470	3.6
TOTAL CITY & SUBURBAN PAID	10,846,606	417,177	419,871	L- 2,694	.6
RTZ CARRIERS	264,905	10,189	11,083	L- 894	8.1
RTZ STORE SALES	191,657	7,372	6,870	G- 502	7.3
AOZ CARRIERS	570,695	21,950	23,332	L- 1,382	5.9
AOZ STORE SALES	763,656	29,371	29,505	L- 134	.5
MAIL SUBSCRIPTIONS	98,361	3,783	4,019	L- 236	5.9
TOTAL RTZ & AOZ PAID	1,889,274	72,665	74,809	L- 2,144	2.9

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TOTAL PAID	12,819,469	493,057	497,920	L- 4,863	1.0
CITY & SUBURBAN UNPAID					
SERVICE	35,003	1,346	1,284	G- 62	4.8
SAMPLES	12,319	474	159	G- 315	198.1
RETURNS CARRIERS	150,189	5,777	7,396	L- 1,619	21.9
RETURNS STORE SALES	277,901	10,688	12,936	L- 2,248	17.4
ADVERTISERS	4,852	187	187		
BULK	3,581	138	99	G- 39	39.4
OVER RUN	9,500	365	380	L- 15	3.9
UNACCOUNTED	14,791	569	447	G- 122	27.3
MAIL ROOM SPOILS	11,284	434	767	L- 333	43.4
R.T.Z. & ALL OTHER UNPAID					
SAMPLES	22,415	862	86	G- 776	902.3
ADVERTISERS	2,768	106	101	G- 5	5.0
BULK	1,158	45	39	G- 6	15.4
RETURNS	172,312	6,627	6,366	G- 261	4.1
TOTAL UNPAID	718,073	27,618	30,247	L- 2,629	8.7
NET COPIES TO MAIL ROOM	13,537,542	520,675	528,167	L- 7,492	1.4

247

S/S CTS 73.4% 73.1%
S/S Total 28.5% 28.3%



PLAINTIFF'S EXHIBIT 21
PLAIN DEALER (Morning & Sunday)
Cleveland (Cuyahoga County), Ohio
Newspaper Publisher's Statement

Subject to Audit by Audit Bureau of Circulations, 900 N. Meacham Road, Schaumburg, IL 60196

FOR 6 MONTHS ENDED SEPTEMBER 30, 1983

	Morning (Mon. to Fri.)	Morning (Saturday)	Sunday
TOTAL AVERAGE PAID CIRCULATION	493,329	455,959	500,353

1. TOTAL AVERAGE PAID CIRCULATION BY ZONES:

CITY ZONE	Population	Occupied Households	
1980 Census:	1,498,400	563,478	
1983 ABC Estimate:	1,423,600	555,500	
Carriers not filing lists with publisher			
Single Copy Sales			294,159
Mail Subscriptions			77,189
School-Single Copy Subscriptions, See Par. 12(a) ..			98

TOTAL CITY ZONE, See Par. 12(b)	367,578	338,035	371,446
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RETAIL TRADING ZONE	Population	Occupied Households	
1980 Census:	846,992	277,147	
1983 ABC Estimate:	865,000	293,500	

Single Copy Sales and Carriers not filing
lists with publisher

Mail Subscriptions

School-Single Copy Subscriptions, See Par. 12(a) ..

TOTAL RETAIL TRADING ZONE	71,001	69,514	82,658
TOTAL CITY & RETAIL TRADING ZONES	438,579	407,549	454,104

	Population	Occupied Households	
1980 Census:	2,345,392	840,625	
1983 ABC Estimate:	2,288,600	849,000	

ALL OTHER

Single Copy Sales and Carriers not filing
lists with publisher

Mail Subscriptions

School-Single Copy Subscriptions, See Par. 12(a) ..

TOTAL ALL OTHER	54,750	48,410	46,249
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Subscriptions to Armed Forces (Orders for 11
or more only)

TOTAL PAID Excluding Bulk, (For Bulk Sales, See Par. 5)	493,329	455,959	500,353
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AVERAGES BY QUARTERS:

April 1 to June 30, 1983	497,385	459,912	505,078
July 1 to September 30, 1983	489,335	452,005	495,627

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720

1B. METROPOLITAN STATISTICAL AREA—COUNTY OF PUBLICATION:

Answer optional and not made.

1C. CITY AND RETAIL TRADING ZONES:

CITY ZONE is the corporate limits of Cleveland, plus the balance of Cuyahoga County, Ohio.

RETAIL TRADING ZONE includes, with exception of City Zone, counties of Geauga, Lake, Lorain and MEDINA County, except townships of Guilford and Wadsworth; in PORTAGE County, townships of Aurora, Charlestown, Edinburg, Franklin, Freedom, Garrettsville, Hiram, Mantua, Nelson, Palmyra, Paris, Ravenna, Shalersville, Streetsboro and Windham; and in SUMMIT County, townships of Bath, Boston, Hudson, Northampton, Northfield Center, Richfield, Sagamore Hills and Twinsburg, plus cities of Macedonia and Stow, and villages of Boston Heights, Hudson, Peninsula and Reminderville.

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2. AVERAGE PAID CIRCULATION IN PUBLISHER'S PRIMARY MARKET AREA:

Answer optional and not made.

3. DISTRIBUTION IN TOWNS RECEIVING 25 OR MORE COPIES IN DETAIL BY COUNTIES. (See Audit Report)

4. NET PRESS RUN AND ADJUSTED PAID CIRCULATION BY EDITIONS:

Press Time	Date Printed	Issue Date	Net Press Run	Sales Release See Note	Total Paid	Adjusted Paid Circulation	City Zone	Retail Trading Zone	All Other
Morning Issue for Tuesday, August 23, 1983.									
10:05 PM	8-22	8-23	76,077	A-C	76,872	3,075	15,374	58,423	
12:07 AM	8-23	8-23	412,153	A-C	416,457	353,989	58,304	4,164	
Total			488,230		493,329	357,064	73,678	62,587	

Morning Issue for Saturday, August 20, 1983.

10:48 PM	8-19	8-20	58,080	A-C	56,121	3,367	7,296	45,458	
1:01 AM	8-20	8-20	413,791	A-C	399,838	331,866	59,976	7,996	
Total			471,871		455,959	335,233	67,272	53,454	

Sunday Issue for August 21, 1983.

10:10 PM	8-20	8-21	54,739	A-C	52,230	3,134	4,178	44,918	
12:28 AM	8-21	8-21	469,654	A-C	448,123	362,960	80,662	4,491	
Total			524,393		500,353	366,114	84,840	49,399	

For explanation See Par 12(c). NOTE: A—Immediate sales release in City; C—Sales release on arrival at destination in Retail Trading Zone and All Other.

The paid circulation figures have been adjusted to the 6-month averages in Paragraph 1.

5. AVERAGE BULK SALES IN ALL ZONES: Morning (Mon. to Fri.), 184; Morning (Sat.), 143; Sunday, 52.

6. AVERAGE UNPAID DISTRIBUTION:

	Morning (Mon. to Fri.)	Morning (Saturday)	Sunday
Arrears			
Service, Advertisers, Employees, etc.	1,555	1,312	1,160
Agencies, Complimentary, Samples, etc.	499	342	164
Total	2,054	1,654	1,324

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7. (a) RETURNS POLICY:

Fully returnable to Single Copy Sales Accounts in all zones, except nonreturnable to Single Copy Sales Accounts in part of All Other.

(b) Were these deducted, so that only paid is shown in Par. 1? Yes.

ANALYSIS OF CARRIER & MAIL SUBSCRIPTION SALES (New & Renewal)

8. PREMIUM, COMBINATION, SPECIAL OFFERS, CLUBS AND INSURANCE:

	1 Mo.	3 Mos.	Term Ordered 5 Mos.	1 Yr.	Misc. Periods
(c) With premium and special offers, See Par. 12(d)		467			
Morning		4,937			
Sunday					
(e) Special reduced prices, See Par. 11(b)		388	68	18	1,112
Morning					1,276°
Morning					

(*) This figure does not represent the total number of subscriptions received, but represents the average number of copies served during the period covered by this statement on School-Single Copy/Subscriptions at the special reduced prices shown in Paragraph 11(b).

9. (a) CONTESTS INVOLVING SUBSCRIPTION CONTRACT:

None

(b) CONTESTS NOT INVOLVING SUBSCRIPTION CONTRACT:

See Par. 12(e)

10. ARREARS UNDER THREE MONTHS: (See Audit Report)

11. PRICES:

(a) Basic Prices:

	1 Yr.	5 Mos.	By Mail 3 Mos.	1 Mo.	1 Yr.	6 Mos.	By Carrier 3 Mos.	1 Mo.	1 Wk.
CITY ZONE:									
M. & S.	\$137.00	\$68.00	\$34.45		\$83.20	\$41.60	\$20.80		\$1.60
M. only	93.60	46.80	23.40		52.00	26.00	13.00		1.00
S. only	44.20	22.10	11.05		31.20	15.60	7.80		60¢

RETAIL TRADING ZONE:

By Mail and Carrier, same as City Zone.

ALL OTHER:

By Mail and Carrier, same as City Zone.

CITY ZONE, RETAIL TRADING ZONE & ALL OTHER:
Same as by Carrier in City Zone. (b-c)

Single Copy

M. only

20¢
60¢

(b) Retail Trading Zone; (c) All Other.

(b) Special reduced prices: By Mail in the Retail Trading Zone and All Other to students and members of the U.S. Armed Services, Morning only 1 year \$45.60; 6 months \$23.40; 3 months \$11.70. By Mail and Carrier, Morning only vacation package, 3 weeks for the price of 2 weeks. To schools for classroom use, Morning only 10¢ per copy.

(c) For prices lower than basic see Audit Report.

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12. EXPLANATORY:

Morning News
Sunday News

Latest Released Audit Report for 12 months ended March 31, 1983.

Paragraph 1A.

(a) School-Single Copy Subscriptions, averaging 602 copies per issue Morning in City Zone, 246 copies per issue Morning in Rural Trading Zone and 425 copies per issue Morning in All Other, represent copies sold to schools for classroom use Morning (Mon. to Fri.) at special reduced prices shown in Paragraph 11(b), payment being made from school funds.

(b) Included in Total City Zone is an average of 1,842 copies per issue Morning and 1,842 copies per issue Sunday, representing copies turned to employees.

(c) Paragraph 4.

National advertising may appear in either of 2 zoned editions, "Open run" advertising may appear any day. Local advertising may appear in any combination of from 1 to 3 zoned editions except on Monday and Tuesday when only 2 zoned editions are published.

(d) Paragraph 8(c).

Various premiums ranging in value of from \$1.00 to \$2.02 were offered with subscriptions of 13 weeks or longer at the special reduced prices shown in Paragraph 11(b). Offers were made in the Rural Trading Zone and All Other.

(e) Paragraph 8(b).

A PLAIN DEALER SUPER BOWL WEEKLY FOOTBALL number was conducted starting on August 28, 1983. Each week a total of 14 cash prizes worth \$1,000.00 were offered. A total of \$4,020.00 was paid during the period covered by this statement.

We hereby certify that all statements set forth in this statement are true.

ROBERT W. THRASHER

Circulation Director

Date Signed, October 12, 1983.

ROY O. KOPP

Vice President & Business Manager

01-3480-0

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PLAINTIFF'S EXHIBIT 32



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PLAINTIFF'S EXHIBIT 33



PLAINTIFF'S EXHIBIT 34



PLAINTIFF'S EXHIBIT 35



PLAINTIFF'S EXHIBIT 36



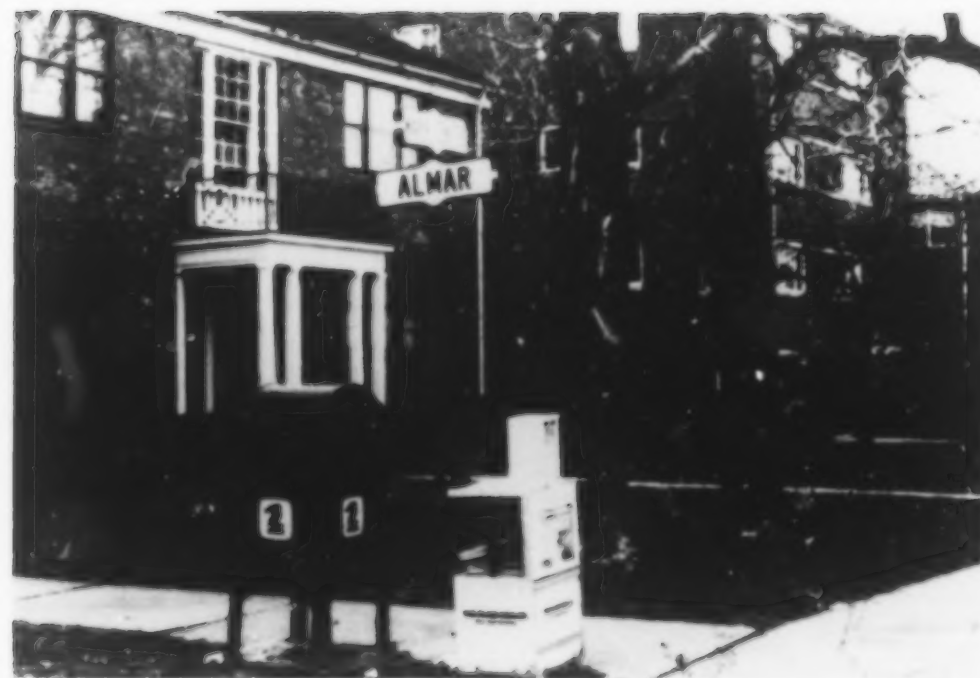
PLAINTIFF'S EXHIBIT 40



PLAINTIFF'S EXHIBIT 41



PLAINTIFF'S EXHIBIT 42



PLAINTIFF'S EXHIBIT 44



JOINT EXHIBIT 1

ORDINANCE NO. 108-83

BY: Brown, Chinnock, Gallagher, Graham,
McBride, Salmon, Wendling

AN EMERGENCY ORDINANCE to amend Section 901.18 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood to provide for the regulation of the use of public property.

WHEREAS, the United States District Court has granted Summary Judgment holding Section 901.18 of the Codified Ordinances of the City of Lakewood to be unconstitutional and void, specifically in reference to the placement of coin operated newspaper boxes on public property, and

WHEREAS, the United States District Court has, however, held the matter of a permanent injunction in abeyance to give the City of Lakewood an opportunity to enact reasonable regulations concerning the placement of newspaper boxes on public property, and

WHEREAS, this Council determines that it is in the best interest of the City to provide for the placement of structures on public property subject to permit obtained from this Council except as may otherwise be permitted by ordinance, and

WHEREAS, this ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY
OF LAKEWOOD, STATE OF OHIO:

Section 1. That Section 901.18 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

shall be and the same is hereby amended to read as follows:

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND.

(a) No person shall erect, place, or caused to be erected or placed or permit to remain, any building, structure, or device of any nature upon any street, lane, alley or public ground within the City except with the consent of the owner thereof and where permitted by statutes of the State of Ohio and the Ordinances of the City of Lakewood, including, but not limited to, zoning provisions.

(b) No person, firm, or corporation shall exclusively use property of the City of Lakewood held for use by the general public except pursuant to rental agreements or permits including provision for the payment of a reasonable rental as may be authorized by ordinance. The term "exclusive use", as used in this Section shall mean continuous use of property in the manner hereinabove stated to the exclusion or limitation of the general public for a period of thirty (30) minutes or longer. Applications for rental agreements or permits for the exclusive use of public property

of the City of Lakewood shall be made to the City Council, except as otherwise permitted by ordinance.

Section 2. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 3. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force after the earliest period allowed by law.

Adopted: October 17, 1983 /s/ THOMAS O. McBRIDE
President

/s/ MADELINE A. CAIN
Clerk

Approved: October 18, 1983 /s/ ANTHONY C. SINAGRA
Mayor

JOINT EXHIBIT 2

ORDINANCE NO. 109-83

BY: Brown, Chinnock, Gallagher, Graham,
McBride, Salmon, Wendling

AN EMERGENCY ORDINANCE to enact new Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood to provide for the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City.

WHEREAS, the United States District Court has granted Summary Judgement holding Section 901.18 of the Codified Ordinances of the City of Lakewood unconstitutional and void insofar as it prohibits The Plain Dealer from placing coin operated newspaper boxes on public property within the City, and

WHEREAS, said United States District Court, in Case No. C83-63, has in turn held the matter of a permanent injunction to give the City an opportunity to enact reasonable regulations concerning the placement of newspaper dispensing devices on public property that do not interfere with first amendment rights, and

WHEREAS, this Council finds that there has been no customary use established or authorized respecting the placement of any vending machines on the public streets or sidewalks of the City, that the City has the responsibility pursuant to Ohio Revised Code, Section 723.01 to maintain its streets, sidewalks, and public ways open to the public and free of nuisance and is held civilly liable for failure of, such duty, that the City of Lakewood holds property

for specific governmental purposes and for the use and enjoyment of the public and not for the free and exclusive use of any individual or entity and that lands owned by the City are held in a fiduciary capacity for the benefit of the citizens and taxpayers of the City, and

WHEREAS, this Council has the discretion to authorize use of City property by individual firms to the exclusion of the public only for such consideration as is deemed fair, the same as any other owner of land, and has exercised this right and duty from time to time including the granting of cable television franchises for a consideration, and

WHEREAS, the use of the streets, sidewalks and public places in the City is already regulated by numerous statutes of the State of Ohio and the ordinances of the City of Lakewood, and

WHEREAS, this Council determines it to be in the public interest to provide for the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City, and

WHEREAS, this ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Chapter 901 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood be and the same is hereby supplemented by enacting new Section 901.181 to read as follows:

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

The Mayor, upon application on forms approved by the Mayor may permit the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City by rental permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated metal container not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous sidewalk width to less than eight (8) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the clear space for the passageway of pedestrians is reduced to less than six (6) feet; and

(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical.

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be the fair market rental value for the property used as determined by the Mayor, but not less than Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(d) Rental permits issued pursuant to this Section may be revoked by the Mayor after notice and hearing for any of the following causes:

(1) Fraud, misrepresentation or any false statement contained in the application for such a permit;

(2) violation of any provision of ordinances regulating such rental permit; or

(3) violation of the terms of the rental permit granted.

Notice of hearing for such a revocation shall be given in writing stating the grounds of the complaint together with the time and place of hearing and shall be mailed postage prepaid to the permittee at the address given in the rental permit application at least five (5) days prior to the date set for hearing.

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

Section 2. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public, in

compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 3. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force after the earliest period allowed by law.

Adopted: October 17, 1983 /s/ THOMAS O. McBRIDE
President

/s/ MADELAINE A. CAIN
Clerk

Approved: October 18, 1983 /s/ ANTHONY C. SINAGRA
Mayor

JOINT EXHIBIT 3

ORDINANCE NO. 2-84

BY: Brown, Chinnoek, Gallagher, Graham,
McBride, Wendling

AN EMERGENCY ORDINANCE to amend the first full paragraph of Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood and paragraphs (a), (b)(1), (b)(5), (b)(6), (c)(1), and (c)(3) thereof relating to the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City.

WHEREAS, on October 17, 1983, Council adopted Ordinance No. 109-83 which enacted new Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood to provide for the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City, and

WHEREAS, subsequent to the adoption of said Ordinance No. 109-83, the Administration has engaged in discussions with counsel for The Plain Dealer Publishing Company regarding such ordinance and Case No. C83-63 pending in the United States District Court relating to same, and

WHEREAS, upon due consideration and review of the objections posed by counsel for The Plain Dealer Publishing Company and the subject matter of such ordinance, the Administration recommends certain technical amendments to said ordinance, and

WHEREAS, this ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That the first full paragraph of Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

901.181 NEWSPAPER DISPENSING DEVICES;
PERMIT AND APPLICATION.

The Mayor, upon application on forms approved by the Mayor may permit the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City by rental permit subject to the following terms:

shall be and the same is hereby amended to read as follows:

901.181 NEWSPAPER DISPENSING DEVICES;
PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

Section 2. That paragraph (a) of Section 901.181 of the Streets and Public Services Code of the Codified

Ordinances of the City of Lakewood, now reading as follows:

(a) The term "newspaper dispensing device", as used in this Section, shall mean a mechanical, coin operated metal container not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

shall be and the same is hereby amended to read as follows:

(a) The term "newspaper dispensing device", as used in this Section shall mean a mechanical coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

Section 3. That paragraph (b)(1) of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

(b)(1) so as to reduce the clear, continuous sidewalk width to less than eight (8) feet;

shall be and the same is hereby amended to read as follows:

(b)(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet.

Section 4. That Section (b)(5) of Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

(b)(5) at any location where the clear space for the passageway of pedestrians is reduced to less than six (6) feet; and

shall be and the same is hereby amended to read as follows:

(b)(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet; and

Section 5. That paragraph (b)(6) of Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

(b)(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical.

shall be and the same is hereby amended to read as follows:

(b)(6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition.

Section 6. That paragraph (c)(1) of Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood, now reading as follows:

(c)(1) the permittee shall pay a rental fee which shall be the fair market rental value of the property used as determined by the Mayor, but not less than Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper device is installed.

shall be and the same is hereby amended to read as follows:

(c)(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed.

Section 7. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 8. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force after the earliest period allowed by law.

Adopted: January 3, 1984 /s/ THOMAS O. McBRIDE
President

/s/ MADELAINE A. CAIN
Clerk

Approved: January 3, 1984 /s/ ANTHONY C. SINAGRA
Mayor

JOINT EXHIBIT 4

Section 901.181, Codified Ordinances, City of Lakewood, As Adopted by Ordinance 109-83, passed October 17, 1983, and Amended by Ordinance 2-84, passed January 3, 1984.

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspaper having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

(a) The term "newspaper dispensing device", as used in this Section shall mean a mechanical coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

(b) Newspaper dispensing devices shall not be placed in the residential use districts of the City and shall otherwise be placed adjacent and parallel to building walls not more than six (6) inches distant therefrom or near and parallel to the curb not less than eighteen (18) inches and not

more than twenty-four (24) inches distant from the curb at such locations applied for and determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance as proscribed by Ohio Revised Code, Section 723.01. Provided further, however, that no newspaper dispensing device shall be placed, installed, used or maintained:

(1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;

(2) within five (5) feet of any fire hydrant or other emergency facility;

(3) within five (5) feet of any intersecting driveway, alley, or street;

(4) within three (3) feet of any marked crosswalk;

(5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;

(6) within two hundred and fifty (25) [sic] feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at an intersection where such placement would not impair traffic or otherwise create a hazardous condition; and

(7) at any location where three (3) newspaper dispensing devices are already located.

(c) The rental permit shall be granted upon the following conditions:

(1) the permittee shall pay a rental fee which shall be Ten Dollars (\$10.00) per year or part thereof, for each location where a newspaper dispensing device is installed;

(2) the permittee, upon the removal of a newspaper dispensing device, shall restore the property of the City to the same condition as when the device was initially installed, ordinary wear and tear excepted;

(3) the permittee shall maintain the device in good working order and in a safe and clean condition and keep the immediate area surrounding such device free from litter and debris;

(4) the permittee shall not use a newspaper dispensing device for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper sold therein;

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less

than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

(6) rental permits shall be for a term of one year and shall not be assignable; and

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(d) Rental permits issued pursuant to this Section may be revoked by the Mayor after notice and hearing for any of the following causes:

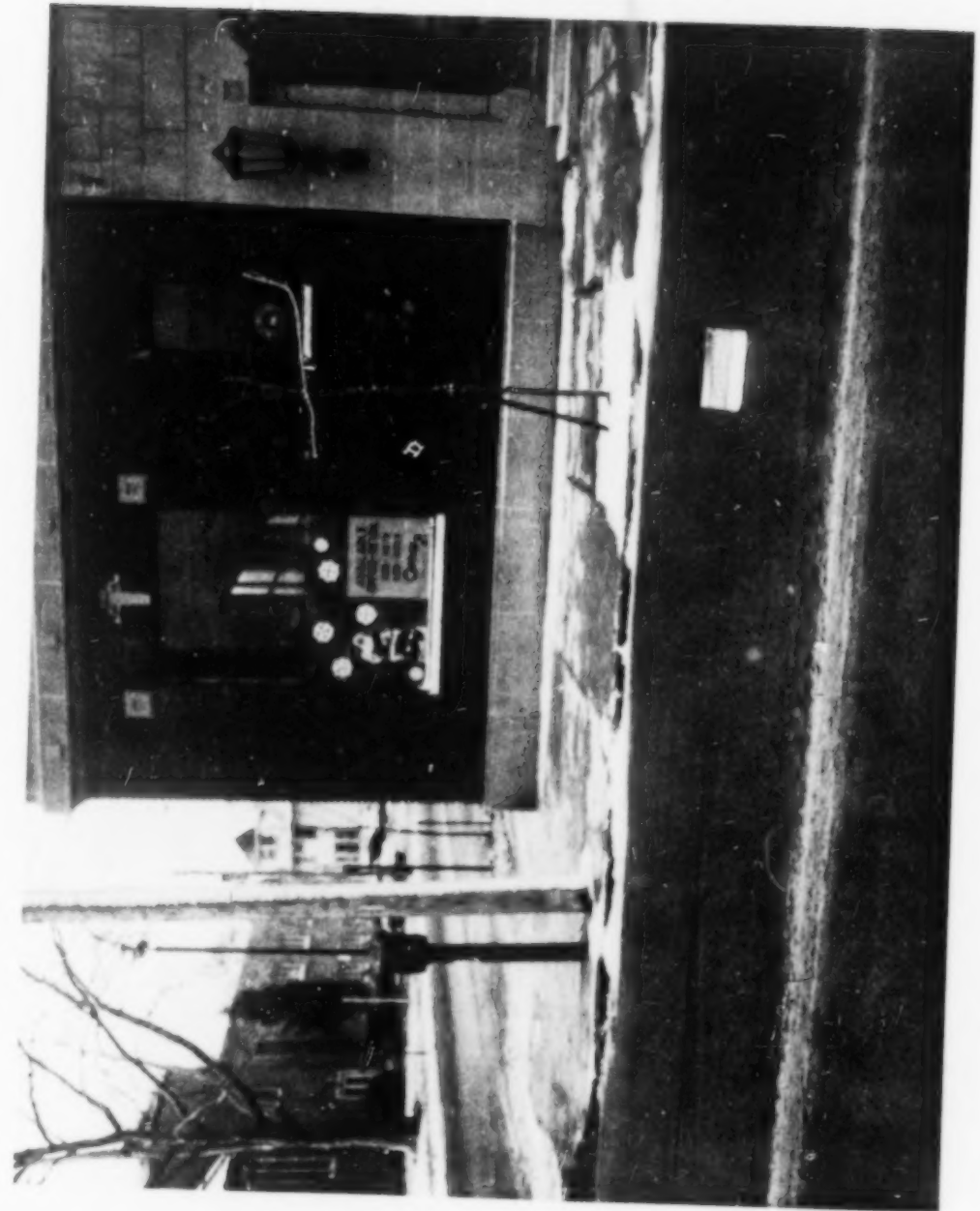
(1) Fraud, misrepresentation or any false statement contained in the application for such a permit;

(2) violation of any provision of ordinances regulating such rental permit; or

(3) violation of the terms of the rental permit granted.

Notice of hearing for such a revocation shall be given in writing stating the grounds of the complaint together with the time and place of hearing and shall be mailed postage prepaid to the permittee at the address given in the rental permit application at least five (5) days prior to the date set for hearing.

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to Council. Such appeal shall be taken by filing a notice of appeal including a statement of the grounds for the appeal with the Clerk of Council within ten (10) days after notice of the decision by the Mayor has been given. Council shall set the time and place for hearing such appeal and notice of such time and place shall be given in the same manner as specified hereinabove. The Council shall have the power to reverse, affirm, or modify the decision of the Mayor and any such decision made by the Council shall be final.

DEFENDANT'S EXHIBIT I

DEFENDANT'S EXHIBIT J



DEFENDANT'S EXHIBIT K



DEFENDANT'S EXHIBIT L



DEFENDANT'S EXHIBIT M



DEFENDANT'S EXHIBIT N



DEFENDANT'S EXHIBIT O



DEFENDANT'S EXHIBIT P



DEFENDANT'S EXHIBIT Q



DEFENDANT'S EXHIBIT Z

LAKESWOOD OHIO
 ZONING CODE
 ORD. 77-82

[SEAL]

ALL REVISION 1/6/83

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CODIFIED ORDINANCES OF LAKESWOOD PART ELEVEN—ZONING CODE

CHAPTER 1101

TITLE; ESTABLISHMENT OF PLAN; PURPOSES;
 INTENT; DEFINITIONS

- 1101.01 Title
- 1101.02 Establishment of Comprehensive Plan
- 1101.03 Purposes
- 1101.04 Intent
- 1101.05 General Terms Defined
- 1101.06 Definitions
- 1101.07 Accessory Use
- 1101.08 Accessory Structure
- 1101.09 Alteration
- 1101.10 Apartment Building
- 1101.11 Basement
- 1101.12 Building
- 1101.13 Building Height
- 1101.14 Cellar
- 1101.15 Cluster House Development
- 1101.16 Coverage
- 1101.17 Curb Level
- 1101.18 Dwelling Unit
- 1101.19 Family
- 1101.20 One-Family Dwelling
- 1101.21 Two-Family Dwelling
- 1101.22 Multiple Family Dwelling
- 1101.23 Customary Home Occupation
- 1101.24 Lot
- 1101.25 Lot Area

- 1101.26 Lot Depth
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- 1101.28 Principal Use
- 1101.29 Sign
- 1101.30 Special Exception
- 1101.31 Story
- 1101.32 Street
- 1101.33 Structure
- 1101.34 Variance
- 1101.35 Yard
- 1101.36 Front Yard
- 1101.37 Rear Yard
- 1101.38 Side Yard

1101.01 TITLE

This Code shall be known as the "Zoning Code of the City of Lakewood" and the maps referred to herein and made a part of this Code shall be known as the "Zoning Map" and "Building Line Map".

1101.02 ESTABLISHMENT OF COMPREHENSIVE PLAN

There is hereby established a Land Use Plan for the City of Lakewood, which plan is set forth in the text, maps and schedules of the Zoning Code, and which may be used as a guide for future land use development.

1101.03 PURPOSES

This Zoning Code is adopted to promote and protect the public health, safety convenience, comfort, prosperity and/or the general welfare of the citizens of the municipality by regulating the use of land and buildings for residence, business, industrial or other uses; by regulating the area and dimensions of land, yards and other open

spaces; by regulating and restricting the bulk, height, design, percent of lot occupancy and location of building; by regulating and limiting population density; and, for the aforesaid purposes, to divide the City into districts of such number and kind as is deemed best suited to carry out these purposes and regulations.

1101.04 INTENT

This Zoning Code is intended, among other purposes:

- (a) To guide the future development of the City in accordance with the Land Use Plan herein set forth and to bring about the gradual conformity of all land and building uses with such plan;
- (b) To provide adequate, open spaces for light and air, to prevent over-crowding of the land, to prevent excessive concentration of population and to prevent uncoordinated development;
- (c) To establish zoning patterns that will insure economical extensions for sewers, water supply and other public utilities, and developments for recreation, schools and other facilities;
- (d) To locate buildings and uses in relation to streets in a way that will cause the least interference with, and be damaged least by, traffic movements and hence result in lessened street congestion and improved public safety;
- (e) To protect the character and value of residential, business, industrial, institutional and public uses and to insure their orderly and beneficial development.

1101.05 GENERAL TERMS DEFINED

The following terms shall have, throughout this Zoning Code, the meaning given herein:

- (a) The word "shall" is to be interpreted as mandatory and not directory;
- (b) The phrases "used for" or "occupied for", as applied to any land or building, shall be construed to include "arranged for", "designated for" or "intended for";
- (c) All words used in the present tense include the future; the singular number includes the plural and the plural the singular, unless the content clearly indicates the contrary;
- (d) The word "lot" includes the word "plot", the word "building" includes the word "structure", the word "City" shall mean the City of Lakewood, the terms "Commission" and "Board" shall mean the Planning Commission and Board of Zoning Appeals respectively.

1101.06 DEFINITIONS

The following words and terms shall have throughout this Zoning Code, the meaning given as hereinafter set forth in this Chapter.

1101.07 ACCESSORY USE

"Accessory Use" means a subordinate use which in the City of Lakewood is wholly related but clearly incidental to that of the principal use of building or land use and located on the same lot as the principal use.

1101.08 ACCESSORY STRUCTURE

"Accessory Structure" means anything constructed, erected or placed, which requires directly or indirectly a location on the land, but detached from the principal structure and is clearly incidental to but wholly related to the principal building or use on the same lot.

1101.09 ALTERATION

"Alteration", applied to a building or structure, means a change or rearrangement in the structural parts or in the existing facilities or an enlargement, whether by extending on a side or by increasing in height or adding a dividing wall, or the moving from one location or position to another.

1101.10 APARTMENT BUILDING

"Apartment Building" means a building arranged, intended or designed to contain three or more dwelling units, each for the exclusive use of one family.

1101.11 BASEMENT

"Basement" means a story or a building located partly below averaged finished grade of the lot, as determined by the Building Commissioner but having at least one-half of its height above finished grade. Excavations made for the purpose of window wells and/or retaining walls shall not be considered in the determination of finished grade.

1101.12 BUILDING

"Building" means any structure having a roof supported by columns or by walls and intended for the housing or enclosure of persons, animals or chattels.

1101.13 BUILDING HEIGHT

"Building Height" means the vertical distance measured in the case of flat roofs, from the mean curb to the level of the highest point of the roof beams adjacent to the street wall, and in the case of pitched roofs, from the mean curb level to the mean height level of the gable. Where no roof beams exist or there are structures wholly or partly above the roof, the height shall be measured from the mean curb level to the level of the highest point of the building exclusive of TV antennas, chimneys, heating and air conditioning equipment.

1101.14 CELLAR

"Cellar" means a space having more than one-half ($\frac{1}{2}$) of its clear height below the adjoining ground as determined by Building Commissioner. Excavations made for the purposes of window wells and/or retaining walls shall not be considered in the determination of the adjoining ground.

1101.15 CLUSTER HOUSE DEVELOPMENT

A cluster house development is a group of single family detached residences arranged around a central courtyard, upon a parcel of land under common ownership, planned and developed as a whole in a single development operation with a program for the future maintenance and repair of all the land, improvements, facilities and services as will be for the common use by all of the building owners in the development.

1101.16 COVERAGE

"Coverage" means that percent of the lot area covered by a building, including any part of a floor, roof or pro-

jections not directly above the foundation. Roof overhang of twelve (12) inches or less including rain gutter shall be excluded from lot coverage.

1101.17 CURB LEVEL

"Curb Level" means the officially established grade of the curb in front of the mid-point of the lot.

1101.18 DWELLING UNIT

"Dwelling Unit" means one or more living or sleeping rooms, with cooking, heating and sanitary facilities which facilities are in contiguous room arrangement, maintained or designed to be occupied as a single family.

1101.19 FAMILY

"Family" means an individual, or two or more persons related by blood, marriage or adoption, or a group of not more than four persons not related by blood, marriage or adoption, living together as a single housekeeping group in a dwelling unit.

1101.20 ONE-FAMILY DWELLING

"One-Family Dwelling" means a detached building containing only one dwelling unit for exclusive use by one-family, and having two side yards.

1101.21 TWO-FAMILY DWELLING

"Two-Family Dwelling" means a building containing only two separate dwelling units each for the exclusive use by one family, each with its own private front and rear entrance doors, and having two side yards.

1101.22 MULTIPLE FAMILY DWELLING

"Multiple Family Dwelling" means a building arranged, intended or designed to contain three or more dwelling units, each for the exclusive use by one family.

1101.23 CUSTOMARY HOME OCCUPATION

"Customary Home Occupation" is any occupation or profession carried on within the dwelling unit by the immediate family residing in the dwelling unit provided that no article is stocked and/or sold in the dwelling unit and in connection with which there is no sign or display that will indicate that the building is being utilized in whole or part for any purpose other than that of a dwelling and for which there is no advertising of any type, including but not limited to the telephone yellow pages, newspapers, magazines or hand bills, posted or delivered.

Any occupation that creates objectionable noise, fumes, odor, dust, electrical interference or more than normal residential traffic shall be prohibited.

1101.24 LOT

"Lot" means a parcel of land occupied or capable of being occupied by one principal building and the accessory buildings or use customarily incident to the lot including such open spaces as are required by this Code.

1101.25 LOT AREA

"Lot Area" means the total area within the property lines, excluding any portion of a street.

1101.26 LOT DEPTH

"Lot Depth" means the average distance from the street line of the lot to its opposite rear line, measured in the general direction of the side lines of the lot.

1101.27 LOT WIDTH

"Lot Width" means the width of the lot at the building line.

1101.28 PRINCIPAL USE

The primary and chief purpose for which a lot, building or portion of the building is used.

1101.29 SIGN

See Sign Ordinance 58-79, Chapter 1329, Building Code.

1101.30 SPECIAL EXCEPTION

A "Special Exception" means a specific use that may be permitted in a use district by the Board of Zoning Code Appeals after holding a public hearing and finding that all conditions specified in the text of the ordinance pertaining to such use exist and that if such use is permitted, it will be in harmony with the neighborhood.

1101.31 STORY

"Story" means that portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between any floor and the ceiling next above it, not including cellar.

1101.32 STREET

"Street" means a public way which affords the principal means of access to abutting properties.

1101.33 STRUCTURE

"Structure" means anything built, placed or erected, the use of which required either location on the ground or attachment to something having location on the ground including, among other things but not limited to barriers, bleachers, booths, buildings, display stands, platforms, poles, pools, sheds, shelters, signs, tanks above or below ground, tents, towers and walls; and shall also mean the supporting framework or parts thereof and appurtenances thereto.

1101.34 VARIANCE

"Variance" means a deviation from the requirements of this Zoning Code granted by the Board of Zoning Appeals under the provisions of and as limited in Article XVI, Section 2, Paragraph 3 of the Charter of the City of Lakewood.

1101.35 YARD

"Yard" means an open space on a lot, unoccupied and unobstructed from the ground to the sky. Roof overhang of 12 inches including rain gutters shall be exempt.

1101.36 FRONT YARD

"Front Yard" means an open, unoccupied space extending the full width of a lot between the building line, as shown on the building line map, and the street line. Covered or uncovered porches, whether enclosed or unenclosed, shall be considered as part of the main building and shall not project into a required front yard.

1101.37 REAR YARD

"Rear Yard" means an open, unoccupied space, on the same lot with the building, between the rear line of the

building and the rear line of the lot and extending the full width of the lot. Covered or uncovered porches, whether enclosed or unenclosed shall be considered as part of the main building.

1101.38 SIDE YARD

"Side Yard" means an open, unoccupied space extending from the building line, or front lot line where no building line is required, to the rear yard or lot line when no rear yard is required and abutting a side lot line; the required width of which yard is a prescribed minimum distance between the side lot line and a line parallel thereto on the lot.

CHAPTER 1103
ESTABLISHMENT OF DISTRICTS, ZONING MAPS,
APPLICATION

- 1103.01 Division Into Districts
- 1103.02 Zoning Map
- 1103.03 Interpretation
- 1103.04 Building Line Map
- 1103.05 Application of Regulations

1103.01 DIVISION INTO DISTRICTS

The city of Lakewood is divided into the following types of districts, and may be referred to by the letter and numerical designation shown herein.

TITLE

One Family District	R1 District
Dwelling House District	R2 District
Multiple family, Low Density	M1 District
Multiple family, Medium Density	M2 District
Business Residential	BR District
Office District	B1 District
Industrial District	X District
Flood Plain (Building Code Chapter 1307, Ord. 73-77, 1/16/78)	FP District

1103.02 ZONING MAP

The location of the districts specified in the preceding Section 1103.01 and the boundaries of such districts are hereby established as shown upon the map which is attached hereto and made a part of this Ordinance, being designated as the Zoning Map. The said map and all the

notations, references and other information shown thereon shall be as much a part of this Code as though such matters and information set forth by said map were all fully set forth herein, except the Flood Plain notation.

1103.03 INTERPRETATION

A district boundary shown within a street or way shall be construed to be in the center thereof, and shall remain a boundary if the street or way is vacated, unless the boundary is changed by an amending ordinance. Where a district boundary is not within a street or way and its location is not precisely indicated by dimensioned distances from known lines, and where the designation on the Zoning Map indicates such boundary to coincide with the boundary line of a recorded lot or parcel of land, then the district boundary line shall be construed to be said line of recorded lot or parcel of land. In the event the boundary does not follow any known line the depth of the district shall be written on the map at such locations.

1103.04 BUILDING LINE MAP

The location of the building lines or setback lines on all streets, as established by Ordinance No. 3286 as amended, shown upon the map which is attached hereto and made a part of this Code, is hereby designated as the Building Line Map. The said map and all parts of this Code are hereby designated as the Building Line Map. The said map and all the notations, references and other information shown thereon shall be as much a part of this Code as if the matters and information set forth by said map were all fully set forth herein. (See Ordinance 9-79)

1103.05 APPLICATION OF REGULATIONS

Except as herein provided, no building or land shall hereafter be used or occupied and no building or part thereof shall be constructed, erected, moved or altered unless in conformity with the regulations and uses specified for the district in which it is located. Unless otherwise stated, all uses not specified as permitted are prohibited.

No part of a yard or other open space about any building required for the purpose of complying with the provisions of this ordinance shall be included as a part of a yard or other open space similarly required for another building.

Unless otherwise indicated, all requirements shall be deemed to be the minimum requirement. All lots shall front on a public street.

CHAPTER 1105

ONE FAMILY DISTRICT, R1

- 1105.01 General Provisions
- 1105.02 Permitted Principal Uses
- 1105.03 Permitted Accessory Uses
- 1105.04 Special Exceptions
- 1105.05 Height Regulation
- 1105.06 Lot Area and Width Regulations
- 1105.07 Side Yard Regulation Principal Building
- 1105.08 Rear Yard Regulation
- 1105.09 Front Yard Regulation
- 1105.10 Off-Street Parking
- 1105.11 Maximum Lot Area Use
- 1105.12 Accessory Building Regulations

1105.01 GENERAL PROVISIONS

The following regulations shall apply to all One Family District (R1).

1105.02 PERMITTED PRINCIPAL USES

In an R1 District, no building or premises shall be used or established which is designed, arranged or intended for other than:

- (1) a one family dwelling;
- (2) cluster house development, provided the conditions herein-after specified are fulfilled.
 - (a) Only single family detached dwellings shall be erected.
 - (b) One dwelling for each 14,000 square feet of land area shall be permitted, provided that the density shall not be increased beyond

that which would be permitted on the lot under the subdivision regulations contained in the Codified Ordinances.

- (c) Proper provisions shall be made for the ownership of all the land in the development to be in the name of the developer until such time as a sufficient number of dwellings are sold to permit the formation of a property owners association at which time the title to all of said land shall be transferred to such associations. Membership in the property owners association shall be limited solely to the owners of the dwellings in the development.
- (d) Covenants shall be included in the deed for each dwelling sufficient to ensure that the use of all the land will be consistent with the provisions of this ordinance governing Cluster House Developments as well as to guarantee that all the land in the development, together with all improvements, facilities and services as will be for the common use by all of the building owners in the development, will be kept in good maintenance and repair. Sewer and water lines beyond the curb shall be installed by the developer and maintained by the association, with separate water meters installed in each home.
- (e) No dwelling or other structure shall be erected within 30 feet of a side or rear boundary line of the parcel.
- (f) No dwelling or other structure shall be erected within 20 feet of another dwelling or structure.

- (g) The building line for that portion of the development which fronts on a public street shall be not less than 50 feet.
- (h) A private drive in lieu of a public street shall be permitted provided:
 - 1) That 15,000 square feet of land area is provided for each dwelling in the development, subject also to the restrictions contained in Section 1105.02 b.
 - 2) That the drive shall terminate in a court or circle having a minimum width or diameter of 80 feet.
 - 3) That such drive be constructed in accordance with specifications prescribed and approved by the City Engineer.
 - 4) That such drive be completed prior to the first occupancy of any home in the development.
 - 5) The property owners association for and in behalf of its members shall waive liability and hold the City of Lakewood harmless for any damage to the private drive which may at any future time be caused by City vehicles or other equipment using said drive to provide municipal services at the request of the property owners or their association.
- (i) The construction of all the dwellings in the development shall be performed pursuant to one building permit for each structure to ensure completion of all the dwellings within a reasonable period of time.

To secure these ends, no building permit shall be issued until the Architectural Board of Review shall have approved the plot plan for the purposed development. Such plan shall include the location and size of the dwellings and their relationship to other dwellings or structures on adjoining lots. The plan shall also show points of access from adjoining lots. The plan shall also show points of access from adjoining streets and provisions for off-street parking as well as landscape treatment indicating the type, size and location of trees, shrubs and other landscaping.

1105.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel with a permitted principal use.

- (a) A Garage not to exceed four hundred square feet area regardless of the requirements of Section 1105.11, provided, however, that a garage may exceed such dimensions if it complies with the requirements of Section 1105.11. (Ordinance 10-79)
- (b) One real estate sign not exceeding five square feet per face in area, advertising only the property on which it is located for sale or rent.
- (c) Customary home occupation provided such home occupation is clearly incidental to the principal building.
- (d) The parking of commercial motor vehicles in the yard area shall not be deemed an accessory use and is prohibited.

1105.04 SPECIAL EXCEPTIONS

The following uses if approved by the Board of Zoning Appeals after public notice and public hearing may be permitted as a special exception provided that the conditions hereinafter specified are met:

- (a) Roomers. The keeping of not more than two (2) roomers, provided:
 - (1) There shall be only one roomer to a sleeping room.
 - (2) There shall be no cooking or eating facilities in the room, nor shall kitchen privileges or a community kitchen be provided.
 - (3) One off-street parking space shall be provided in the rear yard for each roomer.
 - (4) There shall be no signs on the property advertising room for rent.
 - (5) The dwelling in which the rooms are to be let shall be a single family dwelling and shall be the permanent residence of the person requesting the special exception.
 - (6) The special exception shall not be transferable.

1105.05 HEIGHT REGULATIONS

In a R-1 District, no building or structure shall exceed 35 feet in height above the curb level of the street on which it fronts. If there is a different elevation on each side of the lot, a mean elevation shall be used in measuring the maximum height of structure.

1105.06 LOT AREA AND WIDTH REGULATIONS

In an R1 District, no lot shall have an area of less than 14,000 square feet and a width of less than 70 feet at the building line.

1105.07 SIDE YARD REGULATIONS FOR PRINCIPAL BUILDING

The sum of the two side yards shall be no less than 25 feet. Neither side yard shall be less than 10 feet.

1105.08 REAR YARD REGULATIONS

The rear yard depth shall not be less than 40 feet measured from foundation of principal structure. If there is existing an enclosed porch or part of the building projects beyond the foundation, it shall be counted in lot coverage calculation.

1105.09 FRONT YARD REGULATIONS

The front yard shall be as established on the building line map. A driveway curb shall not be considered a structure.

1105.10 OFF-STREET PARKING

- (a) Two paved off-street parking spaces shall be provided for each dwelling unit. One of the required spaces shall be under cover. The front yard shall not be used for off-street parking.
- (b) Off-street parking spaces and their access shall be improved with concrete, asphalt, or any other material approved by the Board of Building Standards. These areas shall be graded and drained so as not to cause a nuisance to abutting properties.

1105.11 MAXIMUM LOT AREA USE

The principal building shall not cover more than 20% of the lot. An accessory building or buildings shall not cover more than 20% of the rear yard except as provided in Section 1105.03 (a).

1105.12 ACCESSORY BUILDING REGULATIONS

- (a) Accessory buildings constructed of wood may not be constructed within three feet of a side or rear property line.
- (b) Accessory buildings having masonry walls without wall openings and roof projections on the property line side of the building shall be set back at least 6" from the rear property line and one side line.

CHAPTER 1107

DWELLING HOUSE DISTRICT, R2

- 1107.01 General Provisions
- 1107.02 Permitted Principal Uses
- 1107.03 Permitted Accessory Uses
- 1107.04 Special Exceptions
- 1107.05 Height Regulations
- 1107.06 Lot Area and Width Regulations
- 1107.07 Side Yard Regulation for Principal Building
- 1107.08 Rear Yard Regulations
- 1107.09 Front Yard Regulations
- 1107.10 Off-Street Parking
- 1107.11 Maximum Lot Area Use
- 1107.12 Accessory Building Regulations

1107.01 GENERAL PROVISIONS

The following regulations shall apply to all structures in the dwelling house districts (R2).

1107.02 PERMITTED PRINCIPAL USES

In an R2 District, no building or premises shall be used or established which is designed, arranged or intended for other than a single family or a two family. A single family building or structure shall not be converted to two family.

1107.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel with a permitted principal use:

- (a) A garage 400 sq. ft. regardless of the requirements of Section 1107.11, provided, however, that a garage may exceed such dimensions if it complies

with the requirements of Section 1107.11 (Ordinance 10-79).

- (b) One real estate sign not exceeding five square feet per face in area, advertising only the property on which it is located for sale or rent.
- (c) Customary home occupation provided such home occupation is clearly incidental to the principal building.
- (d) The parking of commercial motor vehicles in the yard area shall not be deemed an accessory use and is prohibited.

1107.04 SPECIAL EXCEPTIONS

The following uses if approved by the Board of Zoning Appeals after public notice and public hearing may be permitted as a special exception provided that the conditions hereinafter specified are met:

(a) Roomers.

The keeping of not more than two (2) roomers in a single family building and one (1) roomer per dwelling in a two family:

- (1) There shall be only one roomer to a sleeping room.
- (2) There shall be no cooking or eating facilities in the room, and there shall be no kitchen privileges or a community kitchen be provided.
- (3) One off-street parking space shall be provided in the rear yard for each roomer.
- (4) There shall be no signs on the property advertising rooms for rent.

- (5) The dwelling in which the rooms are to be let shall be the permanent residence of the person requesting the special exception to have roomers.

- (6) The special exception shall not be transferable.

1107.05 HEIGHT REGULATIONS

In an R2 district, no building or structure shall exceed 35 feet in height above the curb level of the street on which it fronts. If there is a different elevation on each side of the lot, a mean elevation shall be used in measuring maximum height of the structure.

1107.06 LOT AREA AND WIDTH REGULATIONS

No lot shall be less than 5,000 square feet in area and less than 40 feet in width at the building line.

1107.07 SIDE YARD REGULATIONS FOR PRINCIPAL BUILDING

The sum of the two side yards shall be not less than 15 feet. Neither side yard shall be less than 5 feet.

1107.08 REAR YARD REGULATIONS

The rear yard depth shall not be less than 40 feet measured from the foundation of the principal structure. If an enclosed porch or part of the building projects beyond the foundation, it shall be counted in lot coverage calculation.

1107.09 FRONT YARD REGULATIONS

Front yard shall be as established by the building line map.

1107.10 OFF STREET PARKING

- (a) Two paved off-street parking spaces shall be provided for each dwelling unit. One of the required spaces for each dwelling unit shall be undercover. The front yard shall not be used for off-street parking.
- (b) Off-street parking spaces and their access shall be improved with concrete, asphalt or any other material approved by the Board of Building Standards. These areas shall be graded and drained so as not to cause a nuisance to abutting properties.

1107.11 MAXIMUM LOT AREA USE

The principal buildings shall cover not more than 20% of the lot. Accessory building or buildings shall cover not more than 20% of the area of the rear yard except as provided in Section 1107.03 (a).

1107.12 ACCESSORY BUILDING REGULATIONS

- (a) Accessory buildings constructed of wood may not be constructed within 18 inches of a side and rear property line.
- (b) Accessory buildings having masonry walls without wall openings and roof projections on the property line side of the building shall be set back at least six inches from the rear property line and one side line.

CHAPTER 1109

MULTIPLE FAMILY, LOW DENSITY DISTRICT M1

- 1109.01 General Provisions
- 1109.02 Permitted Principal Uses
- 1109.03 Permitted Accessory Uses
- 1109.04 Special Exception
- 1109.05 Height Regulation
- 1109.06 Lot Area and Width Regulations
- 1109.07 Rear and Side Yard Regulations
- 1109.08 Front Yard Regulations
- 1109.09 Off-Street Parking
- 1109.10 Maximum Lot Area Use

1109.01 GENERAL PROVISIONS

The following regulations shall apply to all Multiple Family, Low Density Districts, M1.

1109.02 PERMITTED PRINCIPAL USES

In a M1 District no building shall be used or established which is designated, arranged or intended for other than the following:

- (a) Low density apartment buildings
- (b) A single or two family dwelling
 - (1) A single or two family dwelling in a M1 District shall meet all the requirements of the R2 District.

1109.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel as the principal use.

- (a) Private garage to house passenger motor vehicles of the occupants of the principal building.

- (b) Customary home occupation provided such home occupation is clearly incidental to the principal building. (A business shall not be considered an accessory use in the M1 District).
- (c) The parking of commercial motor vehicles in the yard area shall not be deemed an accessory use and is prohibited.
- (d) Signs in accordance with Chapter 1329 of the Building Code.

1109.04 SPECIAL EXCEPTION

The following use if approved by the Board of Zoning Appeals after public notice and a public hearing may be permitted as a special exception provided that the standards and conditions hereinafter specified are complied with. In the granting of a Special Exception, the Board of Zoning Appeals may prescribe such additional conditions and safeguards as it deems necessary, desirable or appropriate.

(a) Convenient food shop or delicatessen

- (1) The apartment building in which the facility is located shall have not less than 350 suites.
- (2) The facility shall be permitted only for the use of tenants of the building in which it is located, and shall not be open to the public.
- (3) The facility shall not occupy in excess of 1200 square feet of floor area.
- (4) Merchandise shall be limited to standard food and drug items and shall not include hardware, or other merchandise not generally related to such facility.

- (5) No advertising of any kind shall be permitted on the exterior of the building, on the land on which the building is located, or through telephone directory, general advertising, or other advertising media. (70-73)

1109.05 HEIGHT REGULATION

The height of an apartment building shall be controlled by its side yards.

1109.06 LOT AREA AND WIDTH REGULATION

- (a) The minimum lot width shall be 100 feet at the building line;
- (b) The minimum lot area shall be 15,000 square feet;
- (c) The minimum lot area required for each suite shall be 800 square feet.

1109.07 REAR AND SIDE YARD REGULATIONS

The rear and each side yard shall each be equal to 60% of the height of the building, but not less than twenty (20) feet on interior lot lines. For each two feet all side yards are increased over the required width, five square feet may be subtracted from the required lot area for each suite.

1109.08 FRONT YARD REGULATIONS

The front yard, including the street side of a corner shall be as established on the building line map, or a distance equal to the height of a building measured from the base of the building to the center of the street, whichever gives the greater setback to the building.

1109.09 OFF-STREET PARKING

- (a) A total of one and one-half off-street parking spaces shall be provided for each dwelling unit, one required space shall be undercover and shall be assigned to a dwelling unit.
- (b) Design requirements for all parking areas and parking for accessory uses shall be as established in Chapter 1121.
- (c) The front yard shall not be used for off-street parking space.

1109.10 MAXIMUM LOT AREA USE

The maximum portion of a lot that may be occupied by a building shall be 15%.

CHAPTER 1111

MULTIPLE FAMILY MEDIUM DENSITY M2

- 1111.01 General Provisions
- 1111.02 Permitted Principal Uses
- 1111.03 Permitted Accessory Uses
- 1111.04 Special Exception
- 1111.05 Height Regulations
- 1111.06 Lot Area and Width Regulations
- 1111.07 Rear and Side Yard Regulations
- 1111.08 Front Yard Regulations
- 1111.09 Off-Street Parking
- 1111.10 Maximum Lot Area Use

1111.01 GENERAL PROVISIONS

The following regulations shall apply to all Multiple Family, Medium Density Districts (M2).

1111.02 PERMITTED PRINCIPAL USES

In an M2 District, no building or premises shall be used or established which is designed, arranged or intended for other than the following:

- (a) Medium density apartment buildings;
- (b) A single or two family dwelling;
 - (1) A single or two family dwelling in the M2 District shall meet all the requirements of the R2 District.

1111.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel with a permitted principal use:

- (a) Private garage to house passenger motor vehicles of the occupants of the principal building.
- (b) Customary home occupation provided such home occupation is clearly incidental to the principal building, (A business shall not be considered an accessory use in the M2 District).
- (c) The parking of commercial motor vehicles in the yard area shall not be deemed an accessory use and is prohibited.
- (d) Signs in accordance with Chapter 1329 of the Building Code.

1111.04 SPECIAL EXCEPTION

The following uses if approved by the Board of Zoning Appeals after public notice and public hearing may be permitted as a special exception provided that the conditions hereinafter specified are met:

- (a) Churches, providing no variances are required to accommodate the proposed building and the required off-street parking is available on the same parcel.

1111.05 HEIGHT REGULATIONS

The height of a building shall be controlled by the yard requirements.

1111.06 LOT AREA AND WIDTH REGULATIONS

- (a) The minimum lot width shall be 60 feet at the building line.
- (b) The minimum lot area shall be 10,000 square feet.
- (c) The minimum lot area for each suite in a building having one to four stories shall be 800 square feet.

- (d) The minimum lot area for each suite in a building having five or more stories shall be 600 square feet.

1111.07 REAR AND SIDE YARD REGULATIONS

The rear yard and each interior side yard shall be equal to 75% of the height of the building, but not less than twenty (20) feet in any case. For each two feet all side yards are increased over the required width, five square feet may be subtracted from the required lot area for each suite.

1111.08 FRONT YARD REGULATIONS

The front yard, including the street side of a corner lot, shall be as established on the building line map or a distance equal to 75% of the height of the building measured from the base of the building to the center of the street, whichever gives the greatest setback to the building.

1111.09 OFF-STREET PARKING

- (a) A total of one and one-half off-street parking spaces shall be required for each dwelling unit. One required parking space for each unit shall be under cover and shall be assigned to a dwelling unit.
- (b) The design requirement for all parking spaces shall be as established in Chapter 1121.
- (c) The front yard shall not be used for off-street parking spaces.

1111.10 MAXIMUM LOT AREA USE

The maximum percent of lot that may be occupied by a building shall be 20%.

CHAPTER 1113

BUSINESS RESIDENTIAL (BR)

- 1113.01 General Provisions
- 1113.02 Permitted Principal Uses
- 1113.03 Permitted Accessory Uses
- 1113.04 Special Exception
- 1113.05 Height Regulations
- 1113.06 Lot Area and Width Regulations
- 1113.07 Lot Area Per Dwelling Unit Regulations
- 1113.08 Rear and Side Yard Regulations
- 1113.09 Building Line Regulations
- 1113.10 Off-Street Parking
- 1113.11 Maximum Lot Area Use

1113.01 GENERAL PROVISIONS

The following regulations shall apply to all Business-Residential Districts (BR).

1113.02 PERMITTED PRINCIPAL USES

In a BR District no building or premises shall be used or established which is designed, arranged or intended for other than the following, except that in a BR district any of the permitted uses stated below may be combined in the same building on a lot provided (1) no dwelling units are on the ground floor, (2) a building having combined residence with another permitted use, the use other than residence shall be limited to the ground floor unless each consecutive floor above is devoted entirely to permitted use other than residential.

- (a) Retail stores;
- (b) Office building, banks, savings and loan offices, telephone exchange, barber shops, beauty shops, funeral homes;

- (c) Class IV Dry Cleaning establishments, as regulated in Ohio Basic Building Code, Section 612, and subject to Ohio amendment 4101: 2-6-11.
- (d) Restaurants, taverns, day care centers, nursing homes, hotels and motels.
- (e) Franchised agencies for sale, service and repair of motor vehicles, including the sale of automobiles in the open.
- (f) Tailor shop, shoe repair, TV, radio, office equipment repair shop and leather shop.
- (g) Skating rinks, dance halls, theatres, tennis and racketball courts, bowling alleys and party centers.
- (h) Florists, commercial school, and national fraternal organizations.
- (i) Coin-operated laundry and coin-operated dry cleaning.
- (j) Dry cleaning and laundry pick-up office.
- (k) Apartment houses.
- (l) Single and two-family dwelling provided they comply with requirements of the R2 district.
- (m) Any use of a building, retail use or service, which the Board of Zoning Code Appeals finds to be similar to the uses or services listed in this section in the type of goods or services sold or offered, in the business hours, in the number of persons that are attracted to the premises, in the number of persons employed or occupying the building, off-street parking available, and the compatibility of the use with surrounding property including different abutting zoning classifications.

1113.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel with a permitted principal use:

- (a) One and one-half off-street parking spaces shall be provided for each dwelling unit and at least one-half of the total required spaces for new apartments shall be undercover or enclosed.
- (b) Signs in accordance with Chapter 1329 of the Building Code.
- (c) Customary home occupation provided such home occupation is clearly incidental to the principal use.

1113.04 SPECIAL EXCEPTION

The following uses if approved by the Board of Zoning Code Appeals after public notice and public hearing may be permitted as a Special Exception when the standards and conditions specified for each use are complied with.

- (a) Notice by ordinary mail of the public hearing provided for herein shall be given to the owner or owners of all property located within two hundred (200) feet of the property for which the special exception is requested.
- (b) In the granting of a special exception, the Board of Zoning Appeals may prescribe such additional conditions and safeguards as it deems necessary, desirable or appropriate. The Board may vary the standards specified for land area and minimum dimensions for an exception when it finds,
 - (1) it is unreasonable for the applicant to acquire

more land, (2) the land is suitable for the proposed use, (3) the proposed use will not be detrimental to the neighborhood, (4) any educational facilities shall be on the same parcel as the church building and full time classes shall meet state educational standards.

(1) **GASOLINE SERVICE STATION** (upon compliance with the following terms and conditions);

- (a) As used in this Chapter, "gasoline service station" shall mean the use of a building and premises including pumps, tanks, and equipment primarily for the retail sale of gasoline and oil for delivery into vehicles using the same for fuel or lubrication and may include but not limited to, the retail sale of grease, batteries, tires, and motor vehicle accessories, the performing of services and making of adjustments and minor part replacements to motor vehicles, the washing, waxing and polishing of motor vehicles, as incidental to other services rendered, and the making of repairs to motor vehicles except repairs of a major type. Repairs of a major type are defined to include but not limited to spray painting, body, fender, clutch, transmission, differential, axle, spring and frame repairs, major overhauling of engines requiring the removal of engine cylinder head or crankcase pan or removing the motor; repairs to radiators requiring the removal thereof or complete recapping or retreading of tires.

- (b) The lot upon which such station is located shall have an area of not less than 12,000 square feet, unless the same shall be on a corner lot, in which event the minimum lot width shall apply to both streets and the corner lot shall have an area of not less than 22,000 square feet. At least one street frontage shall be not less than 150 feet in width. The front yard measured from the street line to the building line shall not be less than 50 feet, and side and rear yards of not less than 25 feet. Such front, side and rear yards shall be landscaped and shall be unoccupied by any building or other structure, signs, or other encroachments, except as expressly authorized by sign ordinance Chapter 1329 Building Code.
- (c) The building shall be of modern fireproof construction. The building shall have an enclosed area of not less than 1,200 square feet if any service is to be offered on, or from, the premises other than the delivery of gasoline and oil into vehicles using the same for fuel or lubrication. If a gasoline and oil filling station offers no service other than delivery of gasoline and oil into vehicles using the same for fuel or lubrication, the enclosed area of the building may not be less than 400 square feet, and no such station may offer or provide lubrication, oil changes, repairs, equipment installation, tire changes or repairs, or other services customarily provided by

a gasoline and oil filling station in an enclosed permanent building.

- (d) One or more concrete service islands may be constructed or installed in front of the building line but not nearer than fifteen (15) feet to any street line, which islands shall be raised not less than four (4) inches nor more than twelve (12) inches above grade and upon which may be installed one or more gasoline pumps, and one or more oil racks for the storage and dispensing of oil from cans of approximately one quart capacity, no such pump or rack to exceed six (6) feet in height above grade.
- (e) Not more than 500 gallons of petroleum products, excluding gasoline may be stored above ground.
- (f) Poles and lights for illumination of accessways and service islands may be erected or installed in front of the building line with no part of any such pole or light to be more than twenty (20) feet above curb level.
- (g) All equipment (including display and vending equipment) used in the operation of a gasoline and oil filling station shall be located within a building; all articles, merchandise, or commodities sold or otherwise dispensed, or used, or displayed, at such station shall be stored within the building, except gasoline sold by means of approved gasoline pumps and oil dis-

pensed from cans stored in approved oil racks. All vehicles used in the operation of a gasoline and oil filling station shall be stored within a building except when in actual service. All servicing and repairs to be made in an enclosed building.

- (h) Driveways and parking areas on the lot shall be paved and drained. Off-street parking spaces at the rate of one such parking space for each employee with a minimum of two employee parking spaces, plus one parking space for each service bay, shall be provided in back of the building line. Buffer strips consisting of landscaping, and/or a fence appropriate to the neighborhood as may be required by the Board of Zoning Appeals shall be provided.
- (i) Only vehicles owned or operated by employees or customers of gasoline and oil filling station may be parked at such station, and such vehicles may not be parked between the building line and the street line.
- (j) Refuse or garbage lawfully retained on the premises pending disposal thereof shall be stored within a permanent building or structure or if located outside such building or structure shall be wholly within an enclosed container so located and maintained that its use shall not be injurious, noxious, offensive or hazardous to occupants of premises or to persons of

property beyond the boundaries of the property.

- (k) If any gasoline and oil filling station shall become abandoned, such station shall be presumed to be a nuisance affecting or endangering surrounding property values and to be detrimental to the public health, safety, convenience, comfort, property or general welfare of the community shall be abated. The Building Official in its discretion may order an abandoned gasoline service station demolished. Abandoned is defined as having the pumps removed and/or not operating for three consecutive months.

(2) **THE LIGHT MANUFACTURING OF PRODUCTS** (Upon compliance with the following terms and condition):

- (a) There will be no emission of odors, dust, smoke, gas or fumes from the premises on which the use is proposed to be established.
- (b) There will be no vibrations or noise created by the proposed establishment which can be noticed on the abutting property.
- (c) There will be no storage of raw materials or partially finished or unfinished products in the open.
- (d) The proposed use will not generate an unusual amount of heavy truck traffic.

- (e) Off-street loading dock shall be provided on the property. Adequate off-street parking shall be provided for employees.

(3) **ANIMAL HOSPITALS** (upon compliance with the following terms and conditions):

- (a) The animal hospital shall comply with and meet the standards established by the American Animal Hospital Association or its successors.
- (b) For each Doctor of Veterinary Medicine practicing at said hospital there shall be five (5) off-street-parking spaces provided.
- (c) No outside animal runs or cages be permitted.

(4) **CHURCHES**

Churches and church education buildings shall be permitted provided the following conditions are met:

- (a) That no part of the structure utilized for the church shall be used for a business or residential use.
- (b) No variances are required to off-street parking standard.
- (c) A municipal parking lot shall not be used to satisfy required off-street parking.

1113.05 HEIGHT REGULATIONS

The height of a residential building shall be controlled by the side yard requirement.

1113.06 LOT AREA AND WIDTH REGULATIONS

- (a) Minimum lot width at the building line shall be forty (40) feet.
- (b) Minimum lot area shall be five thousand (5,000) square feet.

1113.07 LOT AREA PER DWELLING UNIT REGULATIONS

The minimum lot area for each dwelling unit shall be five hundred (500) square feet.

1113.08 REAR AND SIDE YARD REGULATIONS

Side yard and rear yard when abutting a lot with a residence on it or a residential district, shall be at least one half the height of the building, but in no case less than five (5) feet.

1113.09 BUILDING LINE REGULATIONS

The building line shall be as established on the Building Line Map and Section 1103.04.

1113.10 OFF-STREET PARKING

- (a) Off-street parking for uses other than residential, See Chapter 1121.
- (b) A total of one and one-half off-street parking spaces shall be required for each dwelling unit. One required parking space for each unit shall be under cover and shall be assigned to a dwelling unit.
- (c) The design requirement for all parking spaces shall be as established in Chapter 1121.

1113.11 MAXIMUM LOT AREA USE

The maximum percent of a lot that may be occupied by a building devoted exclusively to residential use shall be thirty percent (30%).

- (a) A combined retail and residential structure may cover 100% of lot provided off-street parking requirements are met.

CHAPTER 1115

OFFICE DISTRICT B1

- 1115.01 General Provisions
- 1115.02 Permitted Principal Uses
- 1115.03 Permitted Accessory Uses
- 1115.04 Height Regulations
- 1115.05 Lot Area and Width
- 1115.06 Side Yard
- 1115.07 Rear Yard
- 1115.08 Front Yard
- 1115.09 Maximum Lot Area Use

1115.01 GENERAL PROVISIONS

The following regulations shall apply to all Office Districts (B1).

1115.02 PERMITTED PRINCIPAL USES

In a B1 District, no building or premises shall be used or established which is designed, arranged or intended for other than the following:

- (a) Office buildings.
- (b) Banks, savings and loan offices and telephone exchange.
- (c) Barber shops and beauty shops.

1115.03 PERMITTED ACCESSORY USES

The following accessory uses shall be permitted when located on the same lot or parcel with a permitted principal use:

- (a) Off-street parking, as required in Chapter 1121 hereof.

- (b) Signs in accordance with Chapter 1329 of the Building Code.

1115.04 HEIGHT REGULATION

Height of a structure in the B1 district shall not be more than 35 feet.

1115.05 LOT AREA AND WIDTH

Minimum lot width shall be 50 feet and minimum area of 6,000 square feet.

1115.06 SIDE YARD

On a corner lot the street side shall be no less than 5 feet. No inside side yard is required unless abutting on lot with a residence on it in which case the side yard shall be no less than 10 feet.

1115.07 REAR YARD

Rear yard shall have a minimum depth of 40 feet.

1115.08 FRONT YARD

Front yard shall be as established on the building line map.

1115.09 MAXIMUM LOT AREA USE

Maximum lot coverage of principal building 30%.

CHAPTER 1117
INDUSTRIAL DISTRICT X

- 1117.01 General Provisions
- 1117.02 Permitted Principal Uses
- 1117.03 Height Regulations
- 1117.04 Lot Area and Width Regulations
- 1117.05 Side Yard Regulations
- 1117.06 Rear Yard Regulations
- 1117.07 Off-Street Parking
- 1117.08 Maximum Lot Area Use

1117.01 GENERAL PROVISIONS

The following regulations shall apply to all Industrial Districts (X).

1117.02 PERMITTED PRINCIPAL USES

In an X District, land and structures may be used and structures may be erected, altered or enlarged for any use (except a residence), provided that:

- (a) No explosive materials or processes are involved.
- (b) No smoke, fumes, odors, dust, noise, vibration or glaring light which may be detrimental to the health, safety and welfare of residences occupying any residential lot abutting the X District.
- (c) Signs in accordance with Sign Ordinance 58-79, Building Code Chapter 1329.

1117.03 HEIGHT REGULATIONS

No structure in the X District shall exceed one hundred (100) feet in height above the grade of the street on which it fronts.

1117.04 LOT AREA AND WIDTH REGULATIONS

- (a) Minimum lot area - 5,000 square feet
- (b) Minimum lot width - 40 feet
- (c) Minimum lot depth - 125 feet

1117.05 SIDE YARD REGULATIONS

No side yard required except that when an X District lot adjoins a residential district lot, a side yard equal to the height of the X building shall be required on the side of the lot in common with the residential lot.

1117.06 REAR YARD REGULATIONS

No rear yard required except that where an X District lot adjoins a residential district lot, a rear yard equal to the height of the X building shall be required.

1117.07 OFF-STREET PARKING

Off-street parking shall be as established by Chapter 1121.

1117.08 MAXIMUM LOT AREA USE

No limit on lot area use after complying with building line, side yards, rear yard, and off-street parking requirements.

CHAPTER 1119

GENERAL PROVISIONS

- 1119.01 Applicability
- 1119.02 Streets Excluded From Lot Areas
- 1119.03 Frontage and Drives in Multiple Family District
- 1119.04 Width and Area Regulations for Any District
- 1119.05 Residence Building on Unimproved Lot
- 1119.06 Combined Uses
- 1119.07 Subdivision
- 1119.08 Open Space Excluded As Appurtenant to Another Lot
- 1119.09 Side and Rear Yard Exceptions
- 1119.10 Establishing Building Line for Principal Building
- 1119.11 Establishing Building Line for Accessory Building
- 1119.12 Transmitting Antennas and Receiving Antennas
- 1119.13 Vehicles for the Handicapped

1119.01 APPLICABILITY

The following regulations shall apply to all Districts, unless otherwise specified.

1119.02 STREETS EXCLUDED FROM LOT AREAS

For the purpose of determining the number of families that may be housed on a given lot and determining the square footage in such given lot area, the said lot area shall be measured so as not to include any portion of land dedicated as a public street or used for a private street.

1119.03 FRONTAGE AND DRIVES IN MULTIPLE FAMILY DISTRICT

No lot or lots in the R1 or R2 Districts shall be used to provide street frontage for any parcel in the multiple family districts, nor shall a private street or any other

means of ingress or egress servicing a multiple family district traverse any lot in a R1 or R2 residential district.

1119.04 WIDTH AND AREA REGULATIONS FOR ANY DISTRICT

In any use district, no building shall be erected on a lot which does not have the minimum width and lot area required by the district in which the lot is located. All lots must front the minimum required width of a public street, except that if such lot abutts a curved portion of the street, the width of the lot at the building line shall be not less than forty (40) feet.

1119.05 RESIDENCE BUILDING ON UNIMPROVED LOT

No unimproved lot shall be improved by erection thereon of more than one principal building for use for residence purposes.

1119.06 COMBINED USES

No building or lot shall be simultaneously used for a residence and any other use, except home occupation and as provided in Chapter 1113.02 Business Residential (BR).

1119.07 SUBDIVISION

No lot improved with a building shall be either subdivided or further developed by the erection thereon of an additional building unless each lot created shall be subdivided in accordance with applicable ordinances of the City of Lakewood. Preliminary plans for subdividing, replatting or assembly of any parcel or parcels shall be submitted to the Planning Commission for review, for compliance with duly adopted thoroughfare plans, the platting regulations of the amended Charter ordinances

of the City of Lakewood and this Zoning Code; and, until approved by the Commission and recorded any lot so created shall not be improved with a building or sold.

1119.08 OPEN SPACE EXCLUDED AS APPURTENANT TO ANOTHER LOT

No required yard or open space around an existing use or structure on a lot shall be considered as providing a yard or open space for any other use or structure on another lot.

1119.09 SIDE AND REAR YARD EXCEPTIONS

The area required in a yard at any given level shall be open from such level to the sky unobstructed except for the ordinary projections of sky lights and parapets above the grade of such yard and except for the ordinary projections of window sills, belt courses, cornices and other ornamental features to the extent of not more than four (4) inches and roof overhang of 12 inches including gutters.

1119.10 ESTABLISHING BUILDING LINE FOR PRINCIPAL BUILDING

In any district where the location of the building line is not prescribed on the building line map, an application shall be made to the Planning Commission to establish the building line and amend the building line map to show the established building line.

1119.11 ESTABLISHING BUILDING LINE FOR ACCESSORY BUILDING

On a corner lot, the accessory building or building shall be set back from the side street not less than the distance required for the main building on the adjoining butt lot.

1119.12 TRANSMITTING-RECEIVING AND RECEIVING ANTENNAS

All transmitting-receiving and receiving antennas shall be erected in accordance with the following standards and conditions:

- (a) Television antennas shall not have a height greater than 10 feet above the ridge line of the roof of a residential structure on which they are mounted.
- (b) Omnidirectional and directional antennas, other than television antennas, shall not be greater in height than 20 feet above the ridge line of a residential structure on which they are mounted.
- (c) No part of a rotatable antenna shall be erected so that when it is rotated 360 degrees its elements will come within one foot of a property line, extended vertically.
- (d) Antennas on towers or ground-mounted antennas may be permitted by the Board of Zoning Code Appeals provided that the conditions hereinafter set forth are met:
 - (1) Such antennas shall be permitted only in the rear yard.
 - (2) The applicant for a permit for the erection of such antennas shall file an application with the Building Department, which application shall include drawings and published specifications of the manufacturer to establish the tower on the proper foundation will withstand a wind load of 85 miles per hour when erected north of the center line of Lake Avenue. In all other locations the wind load shall not be less than 70 miles per hour.

- (3) No antenna on a tower or a ground-mounted antenna shall exceed fifty-five (55) feet in height above the grade of the lot.
 - (4) All abutting property owners shall be notified of applications for ground-mounted antennas.
 - (5) In considering a request under this section, the Board of Zoning Appeals may prescribe such conditions and safeguards as it deems necessary, desirable or appropriate.
- (e) No antenna, other than television antennas, shall be erected without a permit issued by the Building Department.

1119.13 VEHICLES FOR THE HANDICAPPED

A motor vehicle designed and constructed for the use of a handicapped person and having handicapped registration license plates shall be considered a passenger vehicle and be exempt from the exclusion rules for trucks, vans, and recreation vehicles.

CHAPTER 1121

OFF-STREET PARKING

- 1121.01 General Provisions
- 1121.02 Required Off-Street Parking Spaces
- 1121.03 Parking Design
- 1121.04 Off-Street Loading Areas
- 1121.05 Unlicensed, Immobilized Vehicles
- 1121.06 Applicability
- 1121.07 Variance
- 1121.08 Special Exception Parking

1121.01 GENERAL PROVISIONS

- A. For every building hereafter erected, expanded or where the use is changed or enlarged or converted to condominium there shall be provided off-street parking and loading areas as set forth in this chapter.
- B. The minimum number of parking spaces required for a building shall be computed on the gross square footage of floor area of the building excluding floor space used for mechanical equipment, storage, display, sanitary facilities, cases or racks and hallways.
- C. In the case of mixed uses of one or more uses as listed in Section 1121.02, the total parking spaces shall be equal to the requirements of various uses computed separately.
- D. The number of parking spaces required will be computed to the nearest whole number.
- E. On-site parking spaces for all uses as required in this code, shall be designed, maintained, in ac-

cordance with this code, and used for exclusive use of the tenants, occupants and customer of the buildings or uses on said site.

F. All parking spaces provided in accordance with this Chapter shall be provided on the same lot as the main use to which it is accessory.

G. Unenclosed parking spaces shall not be used for repair of a motor vehicle.

1121.02 REQUIRED OFF-STREET PARKING SPACES

BUILDING OR USE	REQUIRED SPACES
(a) Office (other than medical or dental)	1 space per 200 sq. ft. of floor area used for offices
(b) Hotels - Motels	1 space per guest room or suite
(c) Rooming House	1 space for each roomer
(d) Hospital, Clinics, Nursing Homes	1 space per two beds
(e) Mortuaries	1 space per 30 sq. ft. of assembly rooms
(f) Assembly Halls, Churches, Theatres	1 space per 4 seats in building
(g) Skating Rinks, Dance Halls	1 space per 50 sq. ft. of area used for dancing or skating
(h) Medical, Dental Offices	4 spaces per each doctor's or dentist's office
(i) Retail Stores and Shops	1 space per 150 sq. ft. of floor area used for sales purposes.

- (j) Eating places, Bars, Taverns and Carry out, 1 space per 150 sq. ft. of floor area or 1 space per 4 seats ready to eat
- (k) Furniture, Appliance and Equipment stores 1 space per 350 sq. ft. of floor space
- (l) Manufacturing or Wholesale Establishment 1 space for each two employees on the day shift
- (m) Bowling Alleys 4 spaces for each alley
- (n) Existing structure converted to Condominium occupancy 1.2 spaces for each dwelling unit

For a specific building or use not scheduled above, the Building Department shall apply the unit of measurement for a building or use class listed above which best fits the specific situation.

1121.03 PARKING DESIGN

The following design standards shall apply to off-street parking spaces except in the R1 and R2 districts.

- (a) Each required parking space shall have an unobstructed access to a public street.
- (b) Each required parking space shall have a minimum dimension of 10 feet wide by 20 feet long - 200 square feet exclusive of driveways, aisles, ramps or columns, except that the Architectural Board of Review in its consideration of the design of a parking lot may allow a maximum of 20% of required spaces for compact and subcompact cars not less than 8½ feet wide and 16 feet long.

- (c) Depth of rows or parking spaces shall be 20 feet, except as provided in (b).

Aisle width when row of spaces is at 90 degrees to aisle-minimum of 20 feet.

Aisle width when row of spaces is at 60 degrees to aisle-minimum of 15 feet.

Aisle width when row of spaces is at 45 degrees to aisle-minimum of 10 feet.

- (d) All parking areas, and access driveways shall be improved with concrete, asphalt, or other material approved by the Board of Building Standards, and shall be graded to drain all storm water into a storm sewer. There shall be no free flow of water onto either adjacent properties or sidewalk.
- (e) Spaces shall be so arranged and marked to provide for orderly and safe parking and shall be improved with bumper or wheel stops to define parking space. Concrete curbs at least six inches above the finished surface of the parking area shall be provided to contain the edge of the parking surface and control surface water drainage. Wheel stops shall be placed so that bumpers shall not protrude beyond the curbs.
- (f) Lighting may be required for parking lots to be used after sunset. The light fixtures shall be arranged to reflect light away from adjacent residential property to reduce any annoyance the lights might cause.
- (g) Screening of parking lots.

Parking lots abutting a residential lot or projecting into a residential district by a special exception shall have a solid visual barrier at least four feet

high on the common parking lot, residential lot line by one or a combination of the following methods:

- (1) Solid decorative masonry wall.
 - (2) Landscape earth mound not less than 2 to 1 slope.
 - (3) Treated wood fence.
 - (4) Evergreen hedge and chain link fence.
- (h) The chief of Police shall approve the location of all driveways from or to a public thoroughfare.
- (i) All parking area designs shall be approved by the Architectural Review Board.

1121.04 OFF-STREET LOADING AREAS

Off-street loading spaces shall be provided for the shipment of or receiving of all goods or materials in accordance with the following schedule:

BUILDING OR USE	MINIMUM LOADING SPACE
A. Office	1 space per each 40,000 sq. ft.
B. Retail - All Types	1 space for first 15,000 sq. ft.
	2 spaces for up to 40,000 sq. ft.
	3 spaces for up to 100,000 sq. ft.
	plus 1 space for each additional 50,000 sq. ft.
C. Apartments and Hotels	1 space per each 200 suites in each building or greater than 100 suites.

- D. In the case of mixed uses of one or more of the above uses, the total loading space requirement shall be no less than the amount required for greater use.

1121.05 UNLICENSED, IMMOBILIZED VEHICLES

No person shall store or permit to be stored, for a period of more than three (3) consecutive days, any motor vehicles not having current year license plates and/or damaged or immobilized so as to render it incapable of being moved under its own power, upon any lot or land designated as within any district, unless the same shall be in a completely enclosed building or garage. "Motor vehicle", as defined in Section 301.20 of the Codified Ordinances, shall apply to this section. This section shall not apply to motor vehicle sales lots.

1121.06 APPLICABILITY

The provisions of Section 1121.03 shall be enforced by the Building Commissioner, or such other person as he may designate, when a parking lot is constructed, expanded, enlarged or altered.

1121.07 VARIANCE

In a BR District The Board of Zoning Appeals may grant a variance to the off-street parking requirements if it can be established that there is an equivalent number of unused parking spaces available in a parking lot or an acceptable alternative within 300 feet utilizing sidewalks as the distance from the building in question.

1121.08 SPECIAL EXCEPTION PARKING

The Board of Zoning Appeals may permit as a Special Exception with approval of City Council the use of land in the R1, R2, M1 and M2 district's contiguous to a BR - Business Residential, B1 - Office, and X - Industrial district for off-street parking spaces for customers and employees,

provided it finds the conditions hereinafter specified are met:

- (a) The proposed parking lot will be contiguous to a BR, B1 or X District.
- (b) The Board shall hold a public hearing on the request and written notice shall be mailed to all property owners within 200 feet of proposed lot stating property involved, time, date, and place where hearing will be held.
- (c) The Board shall determine that the applicant is the owner or owners agent of the property in question and that the owner will, in writing, agree to comply with such conditions and restrictions as may be imposed by the Board and all applicable ordinances.
- (d) The Board affirmatively finds that the proposed parking use, subject to such conditions and restrictions as it may impose, will not result in substantial detriment to neighboring property.
- (e) In establishing conditions and restrictions, if any, the Board shall consider, for the protection of the neighborhood, the length of time for construction, maintenance, screening, fences, walls, landscaping, lighting, evening use, need for landscape space 15 feet wide between sidewalk and parking lot, and uses other than parking for customers and employees, provided that the design of the proposed parking area has been approved by the Architectural Board of Review.
- (f) If City Council fails to concur with the recommendations of either or both the Architectural Board of Review and the Board of Zoning Appeals, then it will direct the matter back to the appropriate Board. (Ord. 11-81, effective 5/31/81)

CHAPTER 1123

RECREATION EQUIPMENT

1123.01 Recreational Equipment (Boats and Camp Trailers)

1123.02 Parking and Storage on Private Property - Equipment Prohibited, Exceptions

1123.01 RECREATIONAL EQUIPMENT (BOATS AND CAMP TRAILERS)

Definitions. As used in this Chapter, recreational equipment is defined as and shall include the following:

- (a) A travel trailer is a vehicular, portable structure built on a chassis, designed to be used as a temporary dwelling for travel, recreational and vacation uses, permanently identified travel trailer by the manufacturer.
- (b) A pick-up camper is a structure designed primarily to be mounted on a pick-up or truck chassis and with sufficient equipment to render as suitable for use as a temporary dwelling for travel, recreational and vacation uses.
- (c) A motor home is a portable dwelling designed and constructed as an integral part of self-propelled vehicle.
- (d) A folding tent trailer is a canvas folding structure, mounted on wheels and designed for travel and vacation use.
- (e) Boats and boat trailers shall include boats, floats, rafts, and snowmobiles, plus the normal equipment to transport the same on the highway.

- (f) Antique motor vehicle or vehicles which are intended to be restored.

1123.02 PARKING AND STORAGE ON PRIVATE PROPERTY - EQUIPMENT PROHIBITED, EXCEPTIONS

No person shall park or store, or permit to be parked or stored, recreational equipment upon any lot or land designed as within the boundaries of the R1, R2, M1 and M2 districts except as hereinafter provided. Any owner of recreational equipment may park or store such equipment not in excess of thirty-one (31) feet in overall length only on property where he is living in accordance with the following conditions:

- (a) Recreational equipment parked or stored shall not have fixed connections to electricity, water, gas or sanitary sewer facilities, and at no time shall this equipment be used for living, storage, or house-keeping purposes in the City of Lakewood.
- (b) If the recreational equipment is parked or stored outside of a garage, it shall be parked or stored in the rear yard of the principal building except for the purpose of loading and unloading for a period not to exceed thirty-six (36) consecutive hours.
- (c) All recreational equipment must be kept in good repair and carry a current year's license plate and registration.
- (d) No person shall make or cause to be made major repairs, alterations or conversions of any motor vehicle or recreational equipment unless such repair, alteration or conversion is done in a com-

pletely enclosed garage. Repairs of a major type are herein defined to include, but not limited to spray painting, body, fender, clutch, transmission, differential, axle, plumbing, heating, spring and frame repairs, radiator repair, major overhauling of engines requiring the removal of engine cylinder head or crankcase pan or removing the motor, and conversion of any other type of motor vehicle to recreational equipment as herein defined.

CHAPTER 1125

NON-CONFORMITIES

- 1125.01 Intent
 - 1125.02 Non-Conforming Use of Land
 - 1125.03 Non-Conforming Structure
 - 1125.04 Non-Conforming Use of Structures or of Structures and Premises in Combination
 - 1125.05 Repairs and Maintenance
-

1125.01 INTENT

Within the districts established by this ordinance or amendments that may later be adopted there exists:

- (a) Lots
- (b) Structures
- (c) Uses of land and structures

Which were lawful before this ordinance was passed or amended, but which would be prohibited, regulated, or restricted under the terms of this ordinance or future amendment. It is the intent of this ordinance to permit these non-conformities to continue until they are removed but not encourage their survival.

1125.02 NON-CONFORMING USE OF LAND (OR LAND WITH MINOR STRUCTURES)

Where at the time of passage of this ordinance lawful use of land exists which would not be permitted by the regulations imposed by the ordinance, and where such use involves no individual structures with replacement cost exceeding \$3000 (Three Thousand Dollars) the use may be continued so long as it remains otherwise lawful, provided:

- (a) No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance.
- (b) No such non-conforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this ordinance.
- (c) If any such non-conforming use of land ceases for any reason for a period of six months, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located.
- (d) No additional structure not conforming to the requirements of this ordinance shall be erected in connection with such non-conforming use of land.

1125.03 NON-CONFORMING STRUCTURE

Where a lawful structure exists at the effective date of adoption or amendment of this ordinance that could not be built under the terms of this ordinance by reason of restrictions on area, lot coverage, height, yards, its location on the lot, or other requirements concerning the structure, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

- (a) No such non-conforming structure may be enlarged or altered in a way which increases its non-conformity, but any structure or portion thereof may be altered to decrease its non-conformity.
- (b) Should such non-conforming structure or non-conforming portions of structure be destroyed by

any means to an extent of more than 50 percent of its replacement cost at time of destruction, it shall not be reconstructed except in conformity with the provisions of this ordinance.

- (c) Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to the regulations for the district in which it is located after it is moved.
- (d) No single family, single structure, shall be converted to or enlarged or altered to accommodate more than one family.

1125.04 NON-CONFORMING USE OF STRUCTURES OR OF STRUCTURES AND PREMISES IN COMBINATION

If lawful use involving individual structures with a replacement cost of \$3000 or more, or of structure and land in combination, exists at the effective date of adoption or amendment of this ordinance, that would not be allowed in the district under the terms of this ordinance, the lawful use may be continued so long as it remains otherwise lawful, subject to the following provisions:

- (a) No existing structure devoted to a use not permitted by this ordinance in the district in which it is located shall be enlarged, extended, constructed, reconstructed, moved or structurally altered except in changing the use of the structure to a use permitted in the district in which it is located.
- (b) Any non-conforming use may be extended throughout any part of a building which were manifestly arranged or designed for such use at

the time of adoption or amendment of this ordinance, but no such use shall be extended to occupy any land outside such building.

- (c) If no structural alterations are made, any non-conforming use of a structure or structure and land, may as a special exception be changed to another non-conforming use provided the Board of Zoning Appeals make the following findings:
 1. That the proposed use is more appropriate and compatible with the neighborhood than the existing use.
 2. That there will be a reduction in traffic if the existing use created a traffic problem.
 3. In permitting such change the Board may require appropriate conditions and safeguards that it deems necessary to protect and improve the neighborhood.
- (d) Any structure, or structure and land in combination in or on which a non-conforming use is superseded by a permitted use, shall thereafter conform to all of the regulations for the district, and the non-conforming use shall not thereafter be resumed.
- (e) When a non-conforming use of a structure, or structure and land in combination, is discontinued or abandoned intentionally or otherwise for six consecutive months period (except when government action impedes access to the premises), the structure, or structure and premises in combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located.

- (f) Where non-conforming use status applies to a structure and land in combination, removal or destruction of the structure shall eliminate the non-conforming status of the land. Destruction for the purpose of this subsection is defined as damage to an extent of more than 75 percent of the replacement cost at the time of destruction.

1125.05 REPAIRS AND MAINTENANCE

On any non-conforming structure or portion of a structure containing a non-conforming use, work may be done in any period of 12 consecutive months on ordinary repairs, or on repair or replacement of nonbearing walls, fixtures, wiring, or plumbing, to an extent not excluding 10 percent of the current replacement cost of the non-conforming structure or non-conforming portion of the structure as the case may be, provided that the cubic content existing when it became non-conforming shall not be increased. If a non-conforming structure or portion of a structure containing a non-conforming use is physically unsafe or unlawful due to lack of repairs and maintenance and is declared by the Building Commissioner to be unsafe or unlawful by reason of physical condition, it shall not thereafter be restored, repaired or rebuilt except in conformity with the regulations of the district in which it is located. This paragraph shall not apply to one and two family structures. Nothing in the ordinance shall be deemed to prevent the strengthening or restoring to a safe condition of any building or part thereof.

CHAPTER 1127

ADMINISTRATION

- 1127.01 Enforcement
- 1127.02 Building Permits
- 1127.03 Occupancy Certificate Required
- 1127.04 Certificate Application Effectiveness
- 1127.05 Certificate Issuance Record
- 1127.06 Application Information
- 1127.07 Responsibility of Public Officials
- 1127.08 When No Permit to Be Issued
- 1127.09 Amendments
- 1127.10 Minimum Provisions
- 1127.11 Board of Zoning Code Appeals
- 1127.12 Fees
- 1127.13 Penalties for Violation
- 1127.14 Separability Clauses

1127.01 ENFORCEMENT

The Building Commissioner shall administer and enforce this ordinance with the assistance of such other persons he may direct. If the Building Commissioner shall find that any of the provisions in this ordinance are being violated, he shall notify, in writing, the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct such violation. He shall order discontinuance of illegal use of land, buildings, or structures, removal of illegal buildings or structures or of illegal work being done, or shall take any other action authorized by this ordinance to ensure compliance with or to prevent violation of its provisions.

1127.02 BUILDING PERMITS

No building or other structure shall be erected, moved, added to or structurally altered without a permit issued

by the Building Commissioner. No building permit shall be issued by the Building Commissioner except in conformity with the provisions of this Zoning Code unless he received a written special exception, or variance, as provided by this Code.

1127.03 OCCUPANCY CERTIFICATES REQUIRED

A certificate of occupancy shall be obtained from the Building Commissioner for any of the following:

- (a) Occupancy and use of a building hereafter erected or structurally altered.
- (b) Changes in use of an existing building to a use of a different district classification under this Zoning Code.
- (c) Occupancy of vacant land or change in use of land.
- (d) Any change in the use of a non-conforming use.
- (e) Any change of tenants of a retail unit.

No such occupancy, use or change of use shall take place until a certificate of occupancy therefore shall have been issued by the Building Commissioner.

1127.04 CERTIFICATE APPLICATION, EFFECTIVENESS

Written application for a Certificate of Occupancy for a new building, or for an existing building, to be altered, shall be made at the same time as the application for the building permit, and shall be issued upon written request for same when the building or part thereof has been completed in conformity with the provisions of this Zoning Code.

A certificate of occupancy shall remain in effect as long as the use of such building is in full conformity with

the provisions of this Zoning Code and with any conditions upon which such certificate was issued. Upon the serving of notice of any violation of such provisions or conditions, the Certificate of Occupancy shall become null and void, and a new Certificate of Occupancy shall be required for any future use of such building or land.

1127.05 CERTIFICATE ISSUANCE RECORD

On written request by the owner, the Building Commissioner shall issue a Certificate of Occupancy for any use of a building or of land existing at the time of the adoption of this Zoning Code, certifying, after inspection and investigation, the extent and kind of such use and whether the same conforms to the provisions of this Zoning Code with respect to the district in which it is located, or is a non-conforming use.

A record of all certificates of occupancy shall be kept on file in the office of the Building Commissioner, and copies shall be furnished on request to the Planning Commission and to any person having a proprietary or tenancy interest in the building or land affected.

1127.06 APPLICATION INFORMATION

Every application for a building permit or Certificate of Occupancy shall contain or be accompanied by such information as the Building Commissioner shall determine to be necessary for the enforcement of the provisions of this Zoning Code.

1127.07 RESPONSIBILITY OF PUBLIC OFFICIALS

No department, board, official or public employee of the City who is vested with the duty or authority to issue permits, certificates or licenses for any building, purpose or

use shall issue same if such building, purpose or use would be in conflict with the provisions of this Zoning Code, and, if so issued, shall be null and void without the necessity of any proceedings for revocation, and any work undertaken or use established pursuant to any such authorization shall be unlawful. No action shall be taken by any board, agency, officer or employee of the City purporting to validate any such violation.

1127.08 WHEN NO PERMIT TO BE ISSUED

The Building Commissioner shall issue no building permit or Certificate of Occupancy for any building, structure, use or change of use during the period in which an ordinance or other measure, which would forbid the action authorized under such permit, is pending before Council or has been formally recommended to Council by the City Planning Commission or is subject to referendum or referendum is pending thereon. However, no permit shall be withheld for more than one hundred eighty days (180) after acceptance of application therefore, due to such ordinance or measure still pending before but not yet passed by Council at the end of such one hundred-eighty day period.

1127.09 AMENDMENTS

The regulations, restrictions and boundaries set forth in this ordinance may from time to time be amended, supplemented, changed or repealed, provided, however, that no such action may be taken until after it has been referred to the Planning Commission for a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. The Planning Commission shall give public notice of the time, place and purpose of such hearing by publication in a newspaper of

general circulation in the City of Lakewood at least ten days prior to said hearing date. The Planning Commission shall give written notice of a public hearing, stating purpose, time and place to all property owners within two hundred (200) feet of the property for which rezoning is requested, except that if any entire district or a large part of a district is under consideration, notice other than that published in the newspaper need not be given. If the Planning Commission report is not favorable, then the amendment shall not become effective except by the favorable vote of two-thirds of the members of the City Council. The ordinance amending the zoning ordinance shall go into effect forty (40) days after passage by the Council.

1127.10 MINIMUM PROVISIONS

Wherever the requirements of this ordinance are at variance with the requirements of any other lawfully adopted rules, regulations, or ordinances, the most restrictive or that imposing the higher standards shall govern.

1127.11 BOARD OF ZONING CODE APPEALS

Appeals to the board of Zoning Code Appeals concerning interpretation or administration of any of the provisions of the Zoning Code may be taken by any person aggrieved by any decision of the building official. Any person aggrieved by the building official decision concerning the interpretation or administration of this ordinance may make application to the Board of Zoning Code Appeals for a hearing. (Ord. 9-67)

It shall be the duty of the Board of Zoning Appeals:

- (1) To hear and decide appeals from any regulations, order, decision, requirement or determination made by the building official in the application of this zoning ordinance.

- (2) To hear and decide application for special exceptions for any of the uses which by ordinance, requires approval of the Board of Zoning Code Appeals.
- (3) To hear and decide all appeals made for variances in the application of ordinances governing zoning in the City of Lakewood.

No variance in the strict application of the zoning ordinances of the City of Lakewood shall be granted by the Board of Zoning Appeals unless it finds:

- (a) That there exists practical difficulty or unnecessary hardship, fully described in the findings of the Board, that would deprive the owner of the reasonable use of the land or building involved;
- (b) That there are special circumstances or conditions, fully described in the findings of the Board, applying to such land or buildings and not applying generally to land or buildings in the neighborhood, and that said circumstances or conditions are such that strict application of the provisions of the ordinances of the City of Lakewood would deprive the applicant of the reasonable use of such land or buildings;
- (c) That, for reasons fully set forth in the findings of the Board, the granting of the variance is necessary for the reasonable use of the land or building and that the variance granted by the Board is the minimum variance that will accomplish this purpose;

- (d) That the granting of the variance will be in harmony with the general purpose and intent of the ordinances of the City of Lakewood and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
- (4) To do and perform such other duties and functions as may be imposed upon it by the City of Lakewood Charter or the ordinances or resolutions of Council.

1127.12 FEES

Fee for an application to the board of Zoning Code Appeals for a special exception - \$50. A written application together with the \$50 fee shall be submitted to the Secretary of the Board, who shall convey the \$50 to the permit clerk for a receipt. (Ord. 9-67)

Application for a variance to the Zoning Ordinance shall be \$10. (Ord. 9-67)

Fee for an application for an amendment to the Zoning Ordinance by a property owner shall be \$50. It shall be submitted to the Secretary of the Planning Commission who shall convey the \$50 to the Finance Department for a receipt. (Ord. 9-67)

Certificate of Occupancy — Special Inspection - \$10.
Fee Schedule, Ordinance 86-78.

Permit for transmitting - receiving antenna - \$5. Ordinance 19-79.

1127.13 PENALTIES FOR VIOLATION

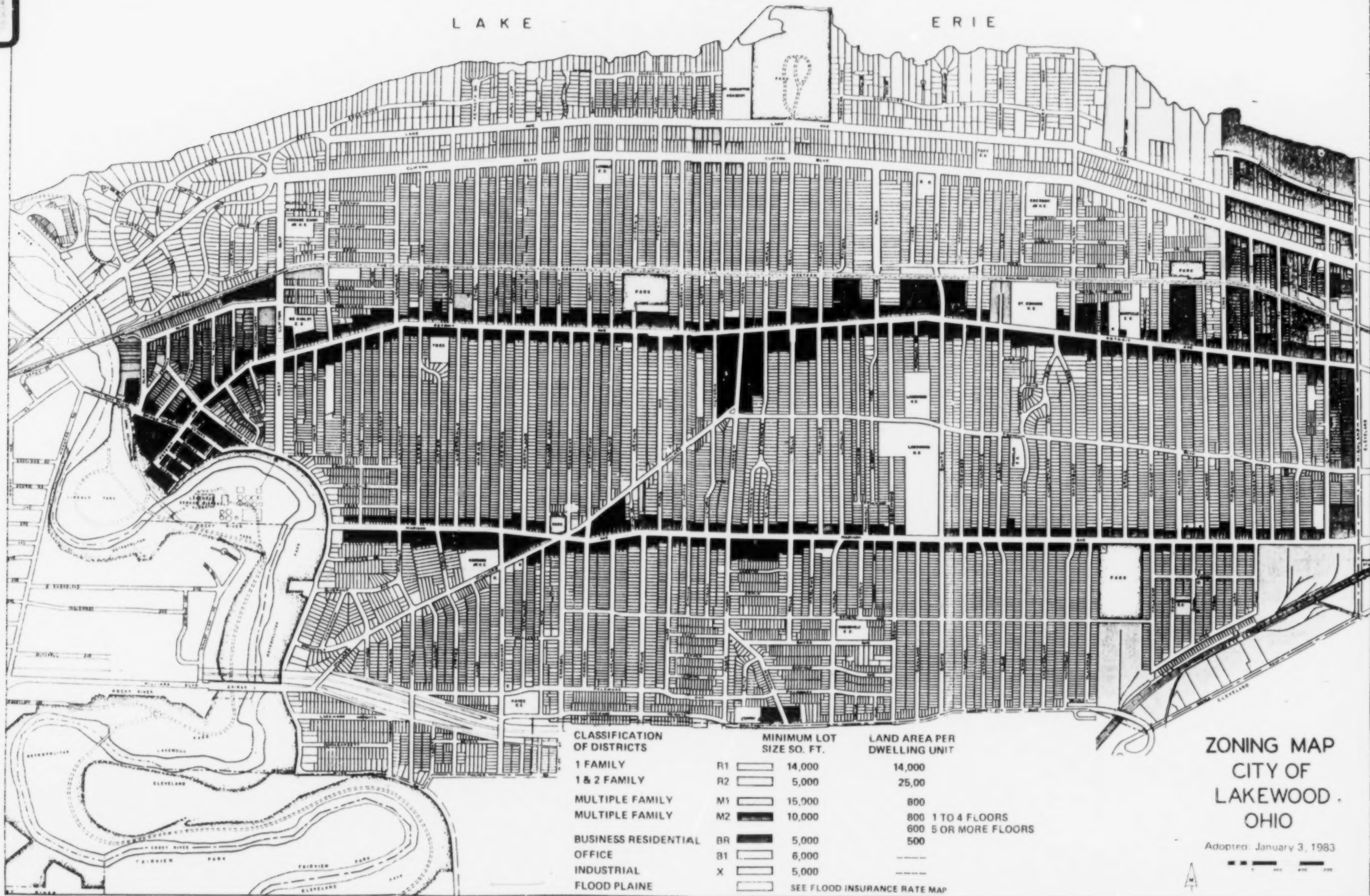
Violation of the provisions of this ordinance or failure to comply with any of its requirements (including violations of conditions and safeguards established in con-

nection with grants of variance or special exceptions) shall constitute a minor misdemeanor. Any person having previously been convicted of an offense under this ordinance, for each subsequent offense, shall be guilty of a misdemeanor of the fourth degree. Each day such violation continues shall be considered a separate offense.

The owner or tenant of any building, structure, premises or part thereof and any architect, builder, contractor, agent or other person who commits, participates, assists in, or maintains such violation may each be found guilty of a separate offense and suffer the penalties herein provided. Nothing herein contained shall prevent the City from taking such other lawful action as is necessary to prevent or remedy any violation.

1127.14 SEPARABILITY CLAUSES

Should any provision of this ordinance be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared to be unconstitutional or invalid.



ZONING MAP
CITY OF
LAKEWOOD,
OHIO

Adopted: January 3, 1983



DEFENDANT'S EXHIBIT AA**"ALL-NIGHT" BUSINESSES
SELLING NEWSPAPERS**

<u>BUSINESS</u>	<u>LOCATION</u>
7-Eleven	16165 Hilliard, Lakewood
7-Eleven	14000 Detroit Avenue, Lakewood
7-Eleven	13396 Madison Avenue, Lakewood
*7-Eleven	1337 West 117th Street, Cleveland
Lawsons	12500 Detroit Avenue, Lakewood
Lawsons	16310 Detroit Avenue, Lakewood
Lawsons	18426 Detroit Avenue, Lakewood
Lawsons	17306 Madison Avenue, Lakewood
*Lawsons	13933 Lakewood Heights Boulevard, Cleveland
The Detroiter	11711 Detroit Avenue, Lakewood
Lakewood Manor Motel	12019 Lake, Lakewood
Yorktown Motel	11860 Clifton, Lakewood
Gold Coast Inn	11837 Edgewater, Lakewood

*Located in Cleveland on perimeter of Lakewood; all other locations are in the City of Lakewood.

DEFENDANT'S EXHIBIT BB

COIN-OPERATED NEWSPAPER DISPENSERS

PROPERTY OWNER/BUSINESS

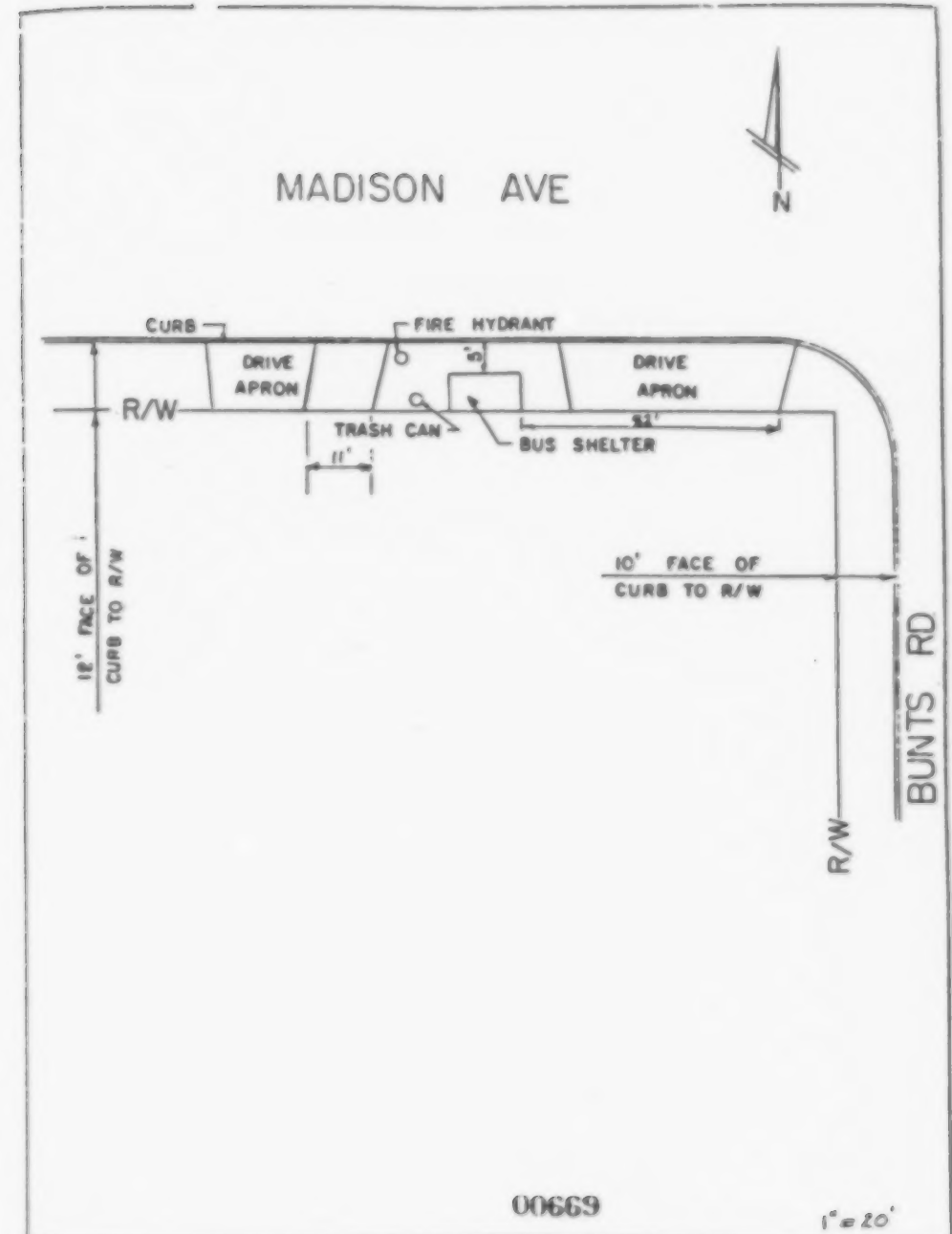
LOCATION

Stills Diner	18260 Detroit Avenue, Lakewood
The Place To Be	1391-95 Warren Road, Lakewood
RTA	RTA turnaround Madison & Lauderdale
Marathon Station	Madison at Onondaga, Lakewood
RTA	RTA turnaround Bridge approach
Fazio's Supermarket	Warren Road, Lakewood
Christian Science Reading Room	Detroit Road, Lakewood
Rego's Supermarket	Detroit at Bunts, Lakewood
Pick-N-Pay Supermarket	Detroit at Bunts, Lakewood
Mister Donut Shop	Detroit at Cohasset, Lakewood
Big Boy Restaurant	Detroit at Mars, Lakewood •West 117th Street at Clifton Blvd., Cleveland •West 117th Street at Detroit, Cleveland

•Located in Cleveland on perimeter of Lakewood; all other locations are in the City of Lakewood.

NOTE: The Plain Dealer is sold at all of the above locations, Exception: Christian Science Reading Room.

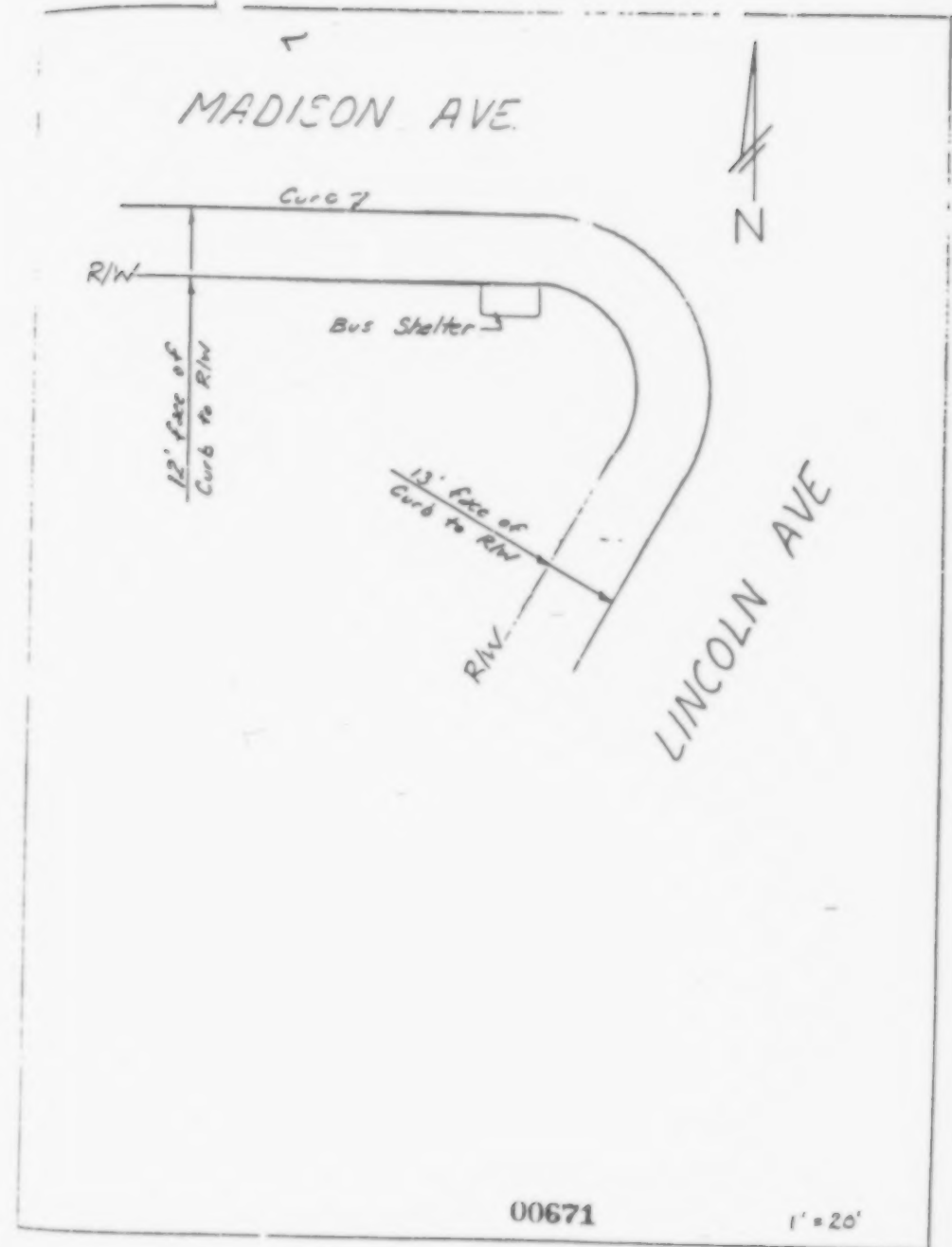
DEFENDANT'S EXHIBIT CC



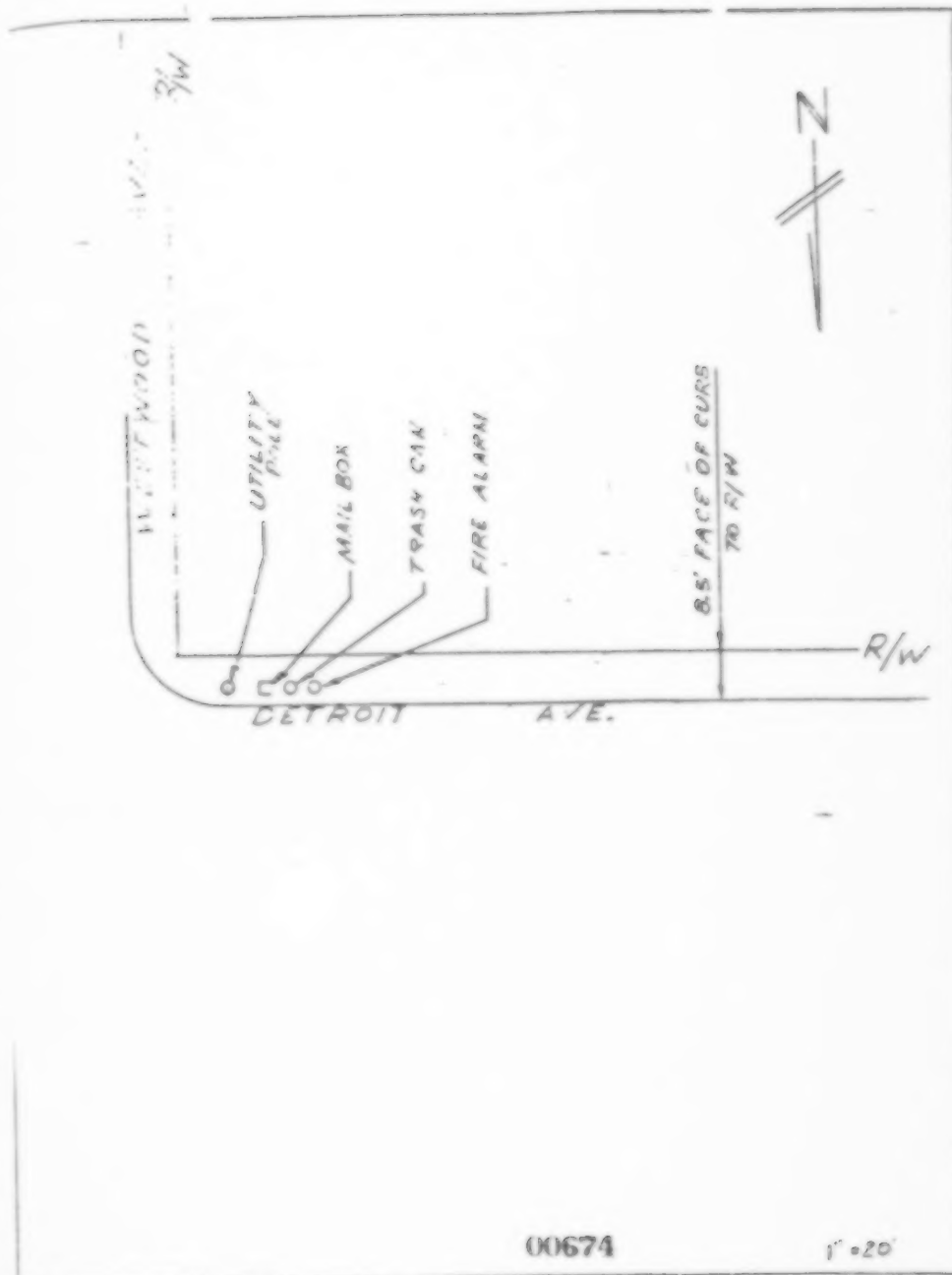
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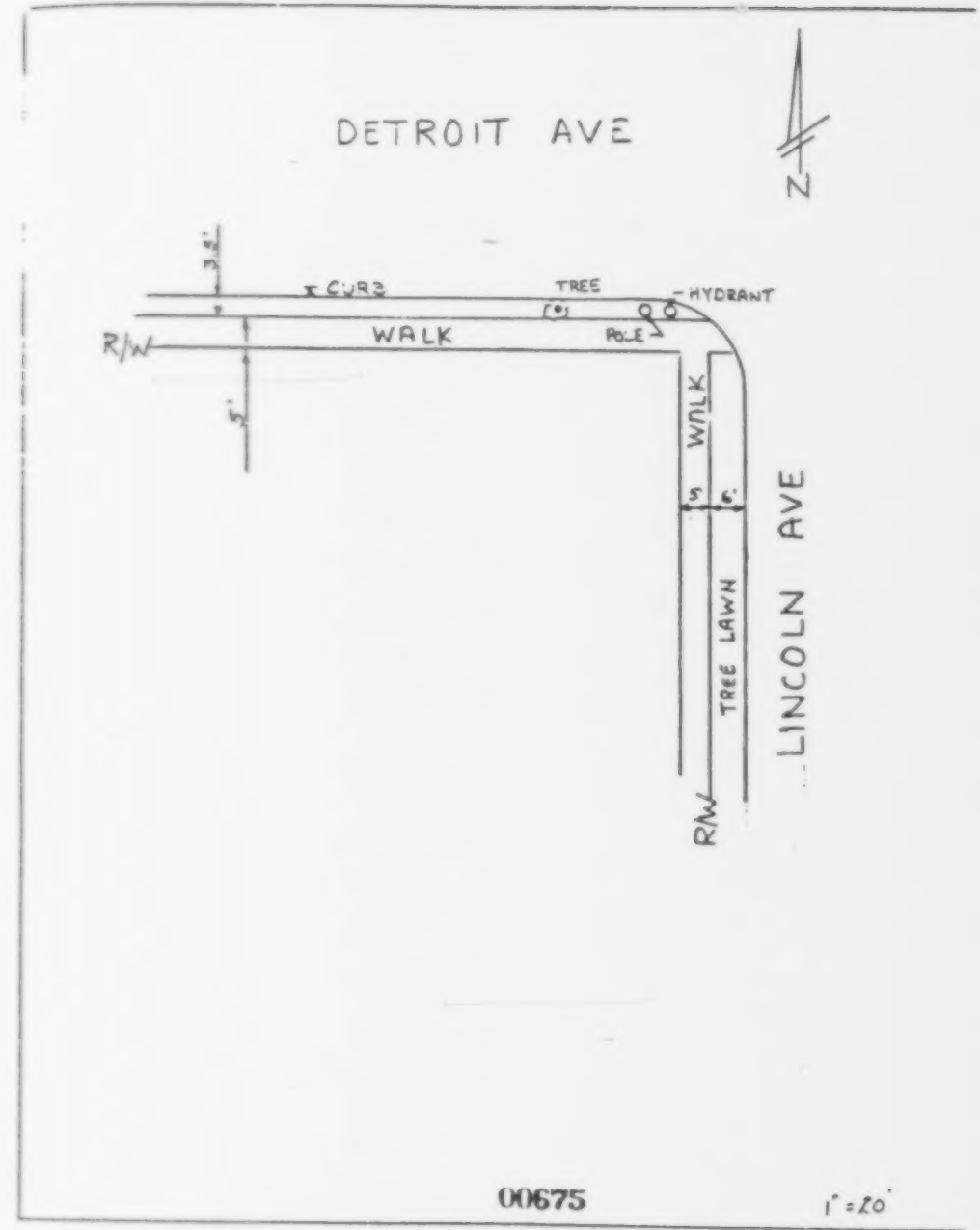
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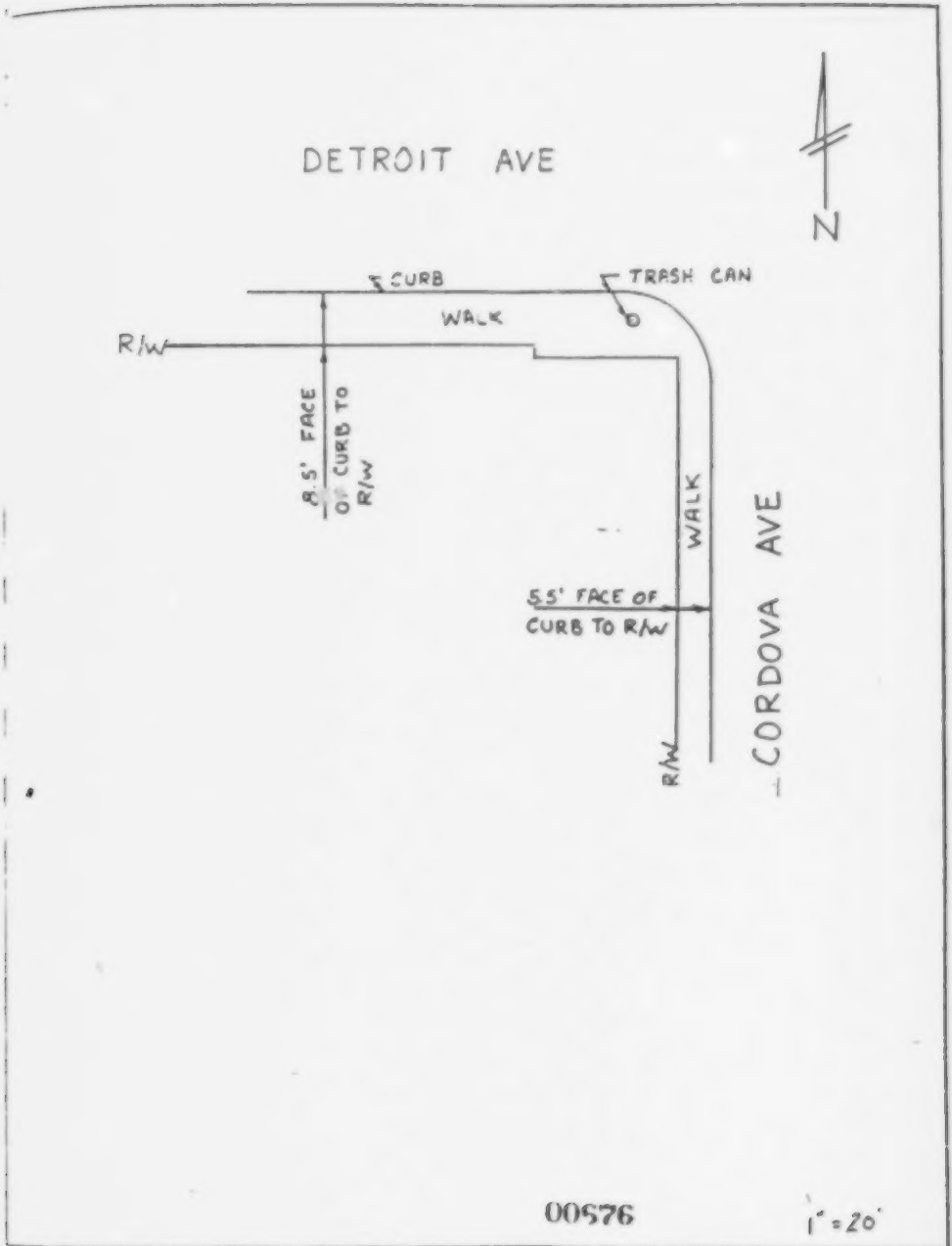


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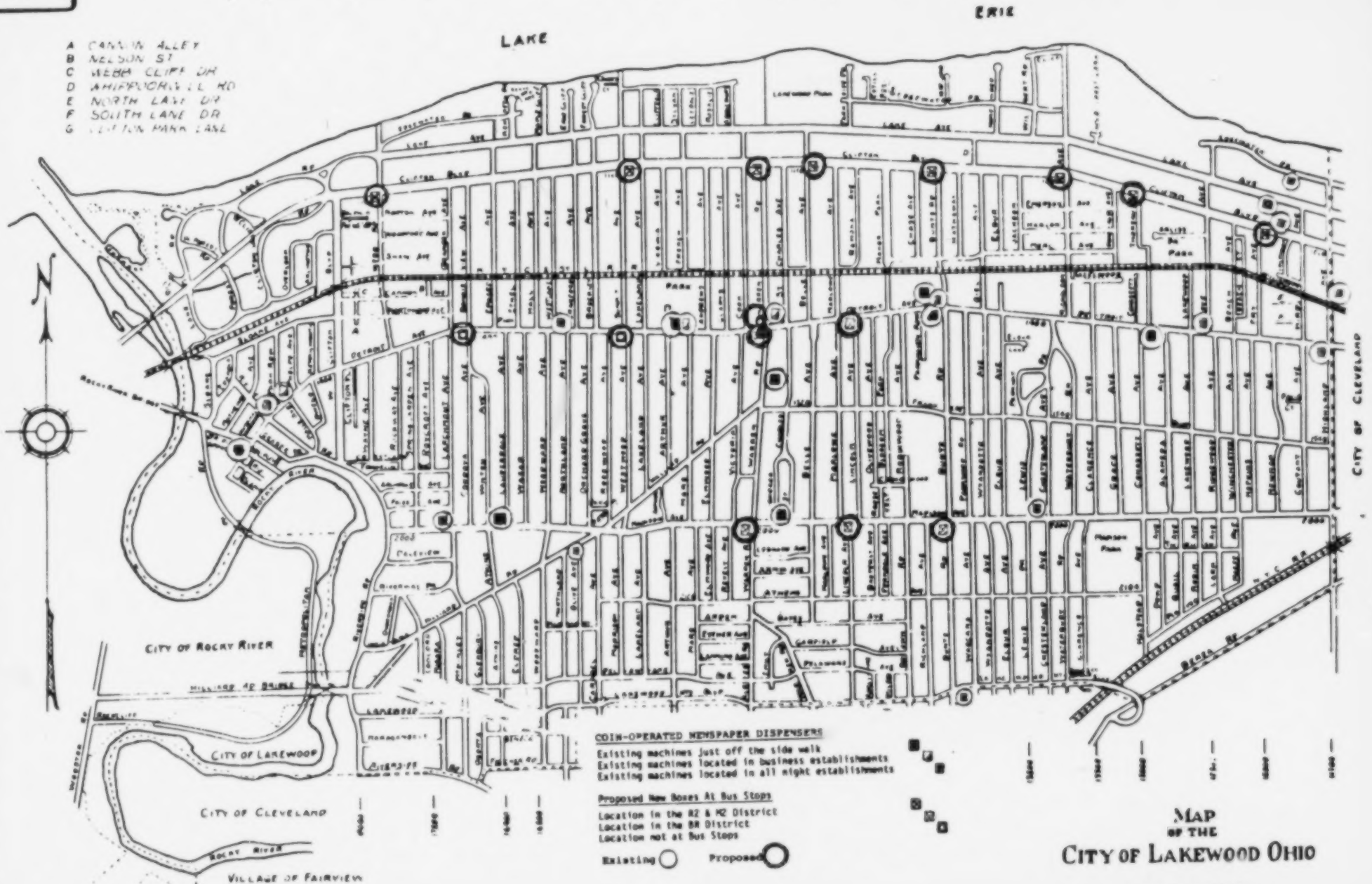




DEFENDANT'S EXHIBIT DD

DEFENDANT'S
EXHIBIT
DD

- A CANNON ALLEY
B NELSON ST
C WEBB CLIFF DR
D WHIPPOORVILL RD
E NORTH LAKE DR
F SOUTH LAKE DR
G LITTLE PARK LANE



DEFENDANT'S EXHIBIT EE**CHAPTER 1325****Architectural Board of Review**

- 1325.01 Establishment of Board.
- 1325.02 Membership.
- 1325.03 Purposes of Board.
- 1325.04 Authority of Board.
- 1325.05 Review of plans and specifications.

CROSS REFERENCES

Organization - see CHTR. Art. XVII, Sec. 1; ADM. 156.02
Powers and duties - see CHTR. Art. XVII, Sec. 2;
ADM. 156.03

1325.01 ESTABLISHMENT OF BOARD.

An Architectural Board of Review is hereby established. "Board", when used in this chapter, shall mean the Architectural Board of Review. (Ord. 18-79. Passed 3-5-79.)

1325.02 MEMBERSHIP.

The Board of Building Standards and Building Appeals established by Chapter 156 of the Administrative Code shall act as the Architectural Board of Review. (Ord 18-79. Passed 3-5-79.)

1325.03 PURPOSES OF BOARD.

The purposes of the Architectural Board of Review are to protect the value, appearance and use of property on which buildings are constructed or altered, to maintain a high character of community development, to protect

the public health, safety, convenience and welfare and to protect real estate within the City from impairment or destruction of value. Such purposes shall be accomplished by the Board by regulating, according to accepted and recognized architectural principles, the design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings to be erected, moved, altered, remodeled or repaired, subject to the provisions of the Zoning and Building Codes and other applicable ordinances of the City, and shall take into consideration the Architectural Standards Workbook which has been adopted by the City. In reviewing, regulating and approving building plans, the Board shall consider and take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties. (Ord. 18-79. Passed - 3-5-79.)

1325.04 AUTHORITY OF BOARD.

The provisions of this chapter shall apply to all new construction and construction which alters exterior elevations wheresoever situated within the City, including construction by the City. The Building Commissioner shall, as he deems necessary, file all drawings, data, reports and complaints received with the Architectural Board of Review respecting applications for building permits wherein the purposes of Section 1325.03 apply. (Ord. 57-81. Passed 6-15-81.)

1325.05 REVIEW OF PLANS AND SPECIFICATIONS.

The Board shall receive and promptly review and pass upon all drawings, data, reports and complaints

filed with it by the Building Commissioner in the order filed, and according to rules and regulations duly adopted and published by the Board for the purposes of its business, which rules and regulations shall not be inconsistent with the purposes of the Board, the provisions of this chapter and the architectural standards as set forth in the Lakewood Architectural Standards Workbook or the same as shall be amended from time to time. The Board shall immediately notify the Building Commissioner in writing of action taken in each instance, and no building permit shall be issued by the Commissioner on applications referred to the Board unless plans and specifications therefor have been approved in writing by the Board. (Ord. 18-79. Passed 3-5-79.)

DEFENDANT'S EXHIBIT FF

(216) 752-9355

(216) 283-0904

DAVID B. HARTT Planning Consultant
3296 Braemar Road • Shaker Heights, Ohio 44120

SERVICES PROVIDED

David B. Hartt, with more than fourteen years of experience in all phases of city planning, provides the following consulting services to both public and private clients:

- *Community planning*—regional research and land evaluation studies; neighborhood revitalization programs; statistical surveys; city-wide master plans; preparation of grant applications, developing programs and administering funds from federal loans or grants.
- *Zoning and other land development codes*—preparation of zoning or subdivision regulations or amendments; evaluation of current or proposed zoning district designations - city wide or for specific property; expert witness for zoning court testimony.
- *Impact studies*—market feasibility studies, tax evaluations; environmental impact statements; developing background data necessary for effective funding of applications and securing necessary project approvals.
- *Site selection and site planning*—evaluation of regional data, including demographic, employment and other market and locational criteria; site development design.

In undertaking these services Mr. Hartt is versed on current federal programs related to planning, community development and environmental preservation. Mr. Hartt also has had extensive involvement with neighborhood organizations, private developers, city councils and other boards and commissions.

EDUCATION

- 1967 Master of City Planning; University of Michigan, Horace H. Rackham School of Graduate Studies
- 1965 Bachelor of Architecture, University of Michigan College of Architecture and Design

PROFESSIONAL BACKGROUND

- | | |
|---------|---|
| Since | David B. Hartt, Planning Consultant |
| 1979 | Self-employed, Cleveland, Ohio |
| 1972 to | Vice-President and Principal |
| 1979 | Henshaw, Hartt and VanPetten, Inc.,
Cleveland, Ohio |
| 1970 to | Chief Planner |
| 1972 | Washtenaw County Metropolitan Planning
Commission, Ann Arbor, Michigan |
| 1968 to | Project Planner |
| 1970 | William A. Gould and Associates, Architects
and City Planners, Cleveland, Ohio |
| 1966 to | Associate Planner |
| 1968 | Washtenaw County Metropolitan Planning
Commission, Ann Arbor, Michigan |

Experience has included services to the following:

- Cities of Berea, Brecksville, Cambridge, Kirtland, Middleburg Heights, Wooster, South Euclid, Macedonia, and Cleveland Heights, Ohio
- Lake County Planning Commission and Sandusky County Regional Planning Commission, Ohio
- Fairview General Hospital, Cuyahoga Valley Communities Council, Lake Underground Storage Corporation, Gibson Realty, Baldwin-Wallace College, Great Lakes Gateway/NORCOM, Marathon Oil Company
- Detroit-Shoreway Community Development Organization, Old Brooklyn Community Development Corporation, and the Kamm's Area Development Corporation
- City of Springfield, Massachusetts; Ann Arbor Township, Pittsfield Township, Village of Manchester and Washtenaw County Board of Commissioners, Michigan

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DEFENDANT'S EXHIBIT GG-7



DEFENDANT'S EXHIBIT GG-9



DEFENDANT'S EXHIBIT II

PLANNING CONTENTS

American Planning Association

Vol. 50, No. 3

March 1984

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COPING WITH HIGH-TECH HEADACHES

An APA researcher tells what planners can do when high-tech innovations cause old-fashioned problems.

By Gregory Longhini

* * * * *

(Relevant text printed; illustrations omitted)

Newspaper vending machines

If, as noted above, First Amendment rights are not an issue in the regulation of dish antennas, they certainly will be when the regulation of newspaper vending machines gets into the courts. Publishers no doubt will claim that any restriction on newspaper distribution infringes on freedom of the press. (To which one planner responds, "That argument is a bunch of bull. There are a lot of activities you're entitled to that you can't do on the sidewalks.") Whether that's true or not, the proliferation of newsracks is making a mess of the sidewalks in many places and becoming a nightmare for planners.

Newspaper vending machines have been around for years, but their sudden surge in numbers has been fueled by technological innovations. Publishers can now transmit their copy electronically, via satellite, to printing plants all around the country. Whereas, in the past, national

newspapers like the *Wall Street Journal* and the *New York Times* were forced to send early morning editions by air-mail, their publishers now own or lease printing plants throughout the country.

The problem has been magnified by the onslaught of *USA Today*, the first national newspaper distributed almost solely by sidewalk vending machines.

To planners, the decision by Gannett News, the publisher of *USA Today*, to market via vending machine is as important as the technological developments that made the paper possible in the first place. As with home occupations, technology is intensifying an already noticeable trend.

Glenn Erikson, the downtown plan coordinator for the city of San Francisco, notes, "We have more newspaper racks selling more types of newspapers than any city in the world. Minority papers, business papers, advertising journals—they're all cluttering the sidewalks. It's not unusual to see 20 machines chained to each other in a row, totally blocking pedestrian movement." (As explained below, the city's proposed downtown plan could bring some relief.)

"We spent \$30 million to fix up Market Street," Erikson adds, "and the news shacks and the vending machines just came in and took over the whole area. They look atrocious." Erickson's frustrations reflect a serious problem. The indiscriminate and uncoordinated proliferation of newspaper vending machines can have serious consequences for public right-of-way, urban design, and property defacement.

Planners and public officials throughout the country are unanimous in damning news vending machines. John Miegs of the Ithaca, New York, planning department says,

"Everywhere you look in this town, you see the bright yellow boxes of a Syracuse paper. It doesn't go with anything."

The city of Aurora, Illinois, had a more serious problem: The vending machines were being chained to the city's expensive new Cor-Ten steel light poles. The chains damaged the poles, requiring additional public maintenance. The worst offender in Aurora was an out-of-town newspaper, and this seems to be the trend everywhere.

Bob Bach of the Dallas planning department summed up a number of planners feelings about this neglect: "The city of Dallas has very good streetscape design standards. When we devised these standards a few years ago, we tried to accommodate newspaper vending machines. We proposed freestanding, modular units of uniform height and size, grey in color with white lettering, secured into the concrete. It's a very attractive design. The two Dallas papers, the *Morning News* and the *Times Herald*, were happy to accommodate us. Then the Houston papers and *USA Today* came in and totally ignored our standards. We may have to press the issue in the future."

The question is what can or should be done about these problems. The most serious impediment to any local regulation is the First Amendment rights of the publishers—or, for the time being, their perceived First Amendment rights. Almost every public official contacted for this article said that fear of a lawsuit was the main cause for inaction. And almost every publisher said that he would try to block any restriction of newspaper vending machines.

Just how swiftly publishers will go to court to maintain total freedom of newsrack location was made evident recently in Greenwich, Connecticut. In 1983, the city

passed an ordinance restricting the location of news vending machines to certain corners in certain areas of the city. A consortium of local and national publishers immediately sought an injunction against the city.

Editors and corporate officials from both the *Greenwich Times* and *USA Today* would not answer any phone calls concerning the issue. Nor would anyone in the city's planning and law departments.

But according to Bill Robinson, an administrative assistant to the city's first selectman (the mayor), Greenwich was not trying to restrict any publisher's right to sell newspapers. The onslaught of *USA Today* had simply overwhelmed the public right-of-way. "All we want to do is permit newsracks in an orderly fashion. The citizens were greatly concerned about the sudden onslaught," Robinson says.

Recently, publishers got a boost from a federal judge. On January 24 the federal district court in Manhattan ruled that the Metropolitan Transportation Authority (MTA) had violated the First Amendment by charging fees for newspaper vending machines at commuter railroad stations. Said Judge Conner, "It has long been settled that the freedoms of speech and press protected by the First Amendment extend to the distribution of newspapers as well as to their publication."

The judge left the door open, however, for regulations that do not impose fees. He noted that the MTA "may constitutionally impose only time, place, and manner conditions which are reasonable in light of the newspaper distribution process and necessary to preserve the purpose and efficient operation of the train station." Thus, reasonable regulations affecting location and design may be upheld by the courts.

Options

Some communities have taken positive steps without having to go to court. By limiting regulations to specific districts—and having very good reasons for them—they have been able to avoid conflicts with publishers.

San Antonio, for example, has prohibited news vending machines along its famed river walk ever since its inception. In Boulder, Colorado, the city worked with developers and merchants to require all news vending machines to be located in one area of the new downtown mall in one unified structure. As with the Dallas design, Boulder's machines blend in with their surroundings.

San Francisco is also undertaking a novel experiment based on standards set forth in the city's proposed downtown plan. The plan says that newsracks should not restrict the loading or unloading of passengers or freight where curbs are marked for that activity. And in areas where they are permitted, the machines should be limited in number so as not to restrict pedestrian flow.

The city is beginning to take steps to enforce the standards. The department of public works is studying a proposal to make four corners of downtown Montgomery Street free of all obstructions, including newspaper vending machines. All of the racks presently in place on these corners would have to be removed. If the program is successful, the city will investigate expanding the restrictions.

Conclusions

The issues discussed in this article are good examples of the ways in which technology changes our lives. The changes are often small, even subtle, but they have the

potential of radically altering land-use patterns and traditional ways of regulating them.

It is also important to note the role played by changing mores and even by marketing decisions. The growth of home occupations, for instance, is fueled as much by the cultural desire to work at home as by any breakthrough in computer technology.

Certainly some technological advances will challenge planners in new and untried ways. But most of them will cause evolutionary, rather than revolutionary, changes. In such situations, planners will be called on to regulate the changes in a traditional manner. Land-use policies will be altered, and new ones will arise. But these policies will be familiar and rooted in the same regulations that planners apply to most developments—old or new, obsolete or advanced.

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AUTO LIABILITY			\$ \$ \$
OTHER			\$ \$ \$
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			MAINTAINING COVERAGE FOLLOWING STATES	LIMIT OF LIABILITY VARIOUS COVERAGE
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<input type="checkbox"/> INDEPENDENT CON. TRACTORS/CONTRACTORS PROTECTIVE			\$1,000,000 AGGREGATE	\$1,000,000 AGGREGATE
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			\$	EACH PERSON
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GENERAL LIABILITY	1/1/85	LG1-121-040000-064	AGGREGATE \$1,000,000	AGGREGATE \$1,000,000
			COMBINED SINGLE LIMIT BODILY INJURY AND PROPERTY DAMAGE	
AUTO LIABILITY			\$	EACH OCCURRENCE \$
			\$	AGGREGATE \$
OTHER			\$	EACH ACCIDENT OR OCCURRENCE \$
			\$	EACH PERSON OR OCCURRENCE \$

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TYPE OF POLICY	EXPIRATION DATE	POLICY NUMBER	LIMITS OF LIABILITY	
WORKERS' COMPENSATION			COVERAGE AFFORDED UNDER W.C. LAWS OF FOLLOWING STATES	LIMIT OF LIABILITY COV. (Indicate limit for each state)
<input checked="" type="checkbox"/> COMPREHENSIVE FORM <input type="checkbox"/> SCHEDULE FORM <input checked="" type="checkbox"/> PRODUCTS, COM. PLATED OPERATIONS <input type="checkbox"/> INDEPENDENT CON. TRACTORS/CONTRACTORS PROTECTIVE <input type="checkbox"/> CONTRACTUAL LIABILITY	1/1/85	LG1-121-040000-064	MARINE COVERAGE FOLLOWING STATES	LIMIT OF LIABILITY MARINE COVERAGE
			BODILY INJURY	PROPERTY DAMAGE
			\$ 1,000,000 EACH OCCURRENCE	\$ 1,000,000 EACH OCCURRENCE
			\$ 1,000,000 AGGREGATE	\$ 1,000,000 AGGREGATE
<input type="checkbox"/> OWNED <input type="checkbox"/> NON OWNED <input type="checkbox"/> HIRED			COMBINED SINGLE LIMIT BODILY INJURY AND PROPERTY DAMAGE	
			\$	EACH OCCURRENCE
			\$	AGGREGATE
OTHER			EACH ACCIDENT SINGLE LIMIT, B.I. AND P.D. COMBINED	
			\$	EACH ACCIDENT OR OCCURRENCE
			\$	EACH ACCIDENT OR OCCURRENCE

LOCATION(S) OF OPERATIONS & JOB # (If Applicable)

CITY OF FAIRVIEW PARK, FAIRVIEW, OHIO

DESCRIPTION OF OPERATIONS:

ADDITIONAL INSURED: CITY OF FAIRVIEW PARK IS COVERED IN RESPECT TO NEWSPAPER VENDING MACHINES IN CITY LIMITS.

NOTICE OF CANCELLATION: (NOT APPLICABLE UNLESS A NUMBER OF DAYS IS ENTERED BELOW). BEFORE THE STATED EXPIRATION DATE THE COMPANY WILL NOT CANCEL OR REDUCE THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNTIL AT LEAST 30 DAYS NOTICE OF SUCH CANCELLATION OR REDUCTION HAS BEEN MAILED TO:

CITY OF FAIRVIEW PARK
2077 LORAIN RD.
FAIRVIEW PARK, OHIO 44126

Paulie Johnson

AUTHORIZED REPRESENTATIVE

11/84
DATE ISSUED

NYO
OFFICE

This is to Certify that

PLAIN DEALER PUBLISHING CO.
1801 SUPERIOR AVE.
CLEVELAND, OHIO

Name and
address of
Insured.

is, at the date of this certificate, insured by the Company under the policy(ies) listed below. The insurance afforded by the listed policy(ies) is subject to all their terms, exclusions and conditions and is not altered by any requirement, term or condition of any contract or other document with respect to which this certificate may be issued.

TYPE OF POLICY	EXPIRATION DATE	POLICY NUMBER	LIMITS OF LIABILITY	
WORKERS' COMPENSATION			COVERAGE AFFORDED UNDER WC LAW OF FOLLOWING STATES	LIMIT OF LIABILITY (CON. B. INDICATE LIMIT FOR EACH STATE)
			MARITIME COVERAGE FOLLOWING STATES	LIMIT OF LIABILITY MARITIME COVERAGE
			BODILY INJURY	PROPERTY DAMAGE
			EACH OCCURRENCE \$1,000,000	EACH OCCURRENCE \$1,000,000
GENERAL LIABILITY	1/1/85	LG1-121-040000-064	AGGREGATE \$1,000,000	AGGREGATE \$1,000,000
			COMBINED SINGLE LIMIT BODILY INJURY AND PROPERTY DAMAGE	
			\$	EACH OCCURRENCE
			\$	AGGREGATE
AUTO LIABILITY			\$	EACH ACCIDENT \$1,000,000 AND P.D. COMBINED
			\$	EACH PERSON \$1,000,000
			\$	OR OCCURRENCE \$1,000,000
OTHER				
LOCATION(S) OF OPERATIONS & JOB # (if applicable)				
CITY OF EUCLID				
DESCRIPTION OF OPERATIONS				

ADDITIONAL INSURED: CITY OF EUCLID IS COVERED IN RESPECT TO NEWSPAPER VENDING MACHINES IN CITY LIMITS.

NOTICE OF CANCELLATION: (NOT APPLICABLE UNLESS A NUMBER OF DAYS IS ENTERED BELOW). BEFORE THE STATED EXPIRATION DATE THE COMPANY WILL NOT CANCEL OR REDUCE THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNTIL AT LEAST 30 DAYS NOTICE OF SUCH CANCELLATION OR REDUCTION HAS BEEN MAILED TO:

CITY OF EUCLID
EUCLID, OHIO

Paulie Johnson

AUTHORIZED REPRESENTATIVE

1/1/84
DATE ISSUED

NYO
OFFICE

This is to Certify that

PLAIN DEALER PUBLISHING CO.
1801 SUPERIOR AVE.
CLEVELAND, OHIO

Name and
address of
Insured.

is, as the date of this certificate, insured by the Company under the policy(ies) listed below. The insurance afforded by the listed policy(ies) is subject to all their terms, exclusions and conditions and is not altered by any requirement, term or condition of any contract or other document with respect to which this certificate may be issued.

TYPE OF POLICY	EXPIRATION DATE	POLICY NUMBER	LIMITS OF LIABILITY	
			COVERAGE AFFORDED UNDER W.C. LAW OF FOLLOWING STATES	LIMIT OF LIABILITY (OV. B. INCLUDING LIMIT FOR EACH STATE)
WORKERS' COMPENSATION				
<input checked="" type="checkbox"/> COMPREHENSIVE FORM <input type="checkbox"/> SCHEDULE FORM <input checked="" type="checkbox"/> PRODUCTS COMPLETED OPERATIONS <input type="checkbox"/> INDEPENDENT CONTRACTORS/CONTRACTORS PROTECTIVE <input type="checkbox"/> CONTRACTUAL LIABILITY	1/1/85	LGL-121-040000-064	BODILY INJURY \$1,000,000 \$1,000,000	PROPERTY DAMAGE EACH OCCURRENCE \$1,000,000 AGGREGATE \$1,000,000 AGGREGATE
<input type="checkbox"/> OWNED <input type="checkbox"/> RENT OWNED <input type="checkbox"/> HIRED			BODILY INJURY AND PROPERTY DAMAGE \$ \$	COMBINED SINGLE LIMIT EACH OCCURRENCE AGGREGATE
<input type="checkbox"/> OWNED <input type="checkbox"/> RENT OWNED <input type="checkbox"/> HIRED			EACH ACCIDENT SINGLE LIMIT-B.I. AND P.D. COMBINED \$ \$ \$	EACH ACCIDENT EACH OCCURRENCE \$
OTHER				

LOCATION(S) OF OPERATIONS & JOB # (If Applicable)

CITY OF CLEVELAND, CLEVELAND, OHIO

ADDITIONAL INSURED: CITY OF CLEVELAND IS COVERED IN RESPECT TO NEWSPAPER VENDING MACHINES IN CITY LIMITS.

NOTICE OF CANCELLATION: (NOT APPLICABLE UNLESS A NUMBER OF DAYS IS ENTERED BELOW). BEFORE THE STATED EXPIRATION DATE THE COMPANY WILL NOT CANCEL OR REDUCE THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNTIL AT LEAST 30 DAYS NOTICE OF SUCH CANCELLATION OR REDUCTION HAS BEEN MAILED TO:

CITY OF CLEVELAND
CLEVELAND, OHIO

Pauline Johnson
AUTHORIZED REPRESENTATIVE

1/1/84
DATE ISSUED

NYO
OFFICE



LIBERTY
MUTUAL



**LIBERTY
MUTUAL**

This is to Certify that

PLAIN DEALER PUBLISHING CO.
1801 SUPERIOR AVE.
CLEVELAND, OHIO

Name and
address of
Insured.

as, at the date of this certificate, insured by the Company under the policy(ies) listed below. The insurance afforded by the listed policy(ies) is subject to all their terms, exclusions and conditions and is not altered by any requirement, term or condition of any contract or other document with respect to which this certificate may be issued.

TYPE OF POLICY	EXPIRATION DATE	POLICY NUMBER	LIMITS OF LIABILITY	
			COVERAGE AFFORDED UNDER W.C. LAW OF FOLLOWING STATES	LIMIT OF LIABILITY TO, B (indicate limit for each state)
WORKERS' COMPENSATION				
<input checked="" type="checkbox"/> Comprehensive Form <input type="checkbox"/> Schedule Form			BODILY INJURY EACH OCCURRENCE \$1,000,000 AGGREGATE \$1,000,000	PROPERTY DAMAGE EACH OCCURRENCE \$1,000,000 AGGREGATE \$1,000,000
<input checked="" type="checkbox"/> PRODUCTS COM. PLANT OPERATIONS <input type="checkbox"/> INDEPENDENT PROP. CONTRACTORS (CONTRACTOR'S LIABILITY)	1/1/85	LG1-121-040000-064	BODILY INJURY AND PROPERTY DAMAGE \$ \$	COMBINED SINGLE LIMIT BODILY INJURY AND PROPERTY DAMAGE \$ \$
<input type="checkbox"/> OWNED <input type="checkbox"/> NON-OWNED <input type="checkbox"/> MIXED			EACH ACCIDENT SINGLE LIMIT \$1 AND \$2 C. UNBODIED \$ \$	EACH ACCIDENT SINGLE LIMIT \$1 AND \$2 C. UNBODIED \$ \$
(CUSTOMER'S OF OPERATIONS & JOBS IF APPLICABLE) CITY OF BAY VILLAGE, BAY VILLAGE, OHIO				

ADDITIONAL INSURED: CITY OF BAY VILLAGE IS COVERED IN RESPECT TO NEWSPAPER VENDING MACHINES IN CITY LIMITS.

NOTICE OF CANCELLATION: (NOT APPLICABLE UNLESS A NUMBER OF DAYS IS ENTERED BELOW). BEFORE THE STATED EXPIRATION DATE THE COMPANY WILL NOT CANCEL OR REDUCE THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNTIL AT LEAST 30 DAYS NOTICE OF SUCH CANCELLATION OR REDUCTION HAS BEEN MAILED TO:

CITY OF BAY VILLAGE
350 DOVER CENTER RD.
BAY VILLAGE, OHIO 44140

Paulie Johnson

AUTHORIZED REPRESENTATIVE

1/1/84

DATE ISSUED

NYO

OFFICE



**LIBERTY
MUTUAL**

This is to Certify that

PLAIN DEALER PUBLISHING CO.
1801 SUPERIOR AVE.
CLEVELAND, OHIO

Name and
address of
Insured.

is, at the date of this certificate, insured by the Company under the policy(ies) listed below. The insurance afforded by the listed policy(ies) is subject to all their terms, exclusions and conditions and is not altered by any requirement, term or condition of any contract or other document with respect to which this certificate may be issued.

TYPE OF POLICY	EXPIRATION DATE	POLICY NUMBER	LIMITS OF LIABILITY	
			COVERAGE AFFORDED UNDER THIS POLICY IN THE FOLLOWING STATES	LIMIT OF LIABILITY (COVER) (Indicate limit for each state)
WORKERS' COMPENSATION			MARITIME COVERAGE FOLLOWING STATES	LIMIT OF LIABILITY MARITIME COVERAGE
			BODILY INJURY	PROPERTY DAMAGE
			\$1,000,000	EACH OCCURRENCE \$1,000,000
			\$1,000,000	AGGREGATE \$1,000,000
			COMBINED SINGLE LIMIT	
			BODILY INJURY AND PROPERTY DAMAGE	
			\$	EACH OCCURRENCE
			\$	AGGREGATE
			\$	EACH ACCIDENT SINGLE LIMIT B1 AND P2 COMBINED
			\$	EACH ACCIDENT SINGLE LIMIT B1 AND P2 COMBINED
			\$	EACH ACCIDENT SINGLE LIMIT B1 AND P2 COMBINED
GENERAL LIABILITY	1/1/85	LG1-121-040000-064		
<input checked="" type="checkbox"/> COMPREHENSIVE FORM				
<input type="checkbox"/> SCHEDULE FORM				
<input checked="" type="checkbox"/> PRODUCTS COMPLETED OPERATIONS				
<input type="checkbox"/> INDEPENDENT CONTRACTORS/CONTRACTORS PROTECTIVE				
<input type="checkbox"/> CONTRACTUAL LIABILITY				
<input type="checkbox"/> OWNED				
<input type="checkbox"/> NON OWNED				
<input type="checkbox"/> HIRED				
AUTO LIABILITY				
OTHER				
LOCATION(S) OF OPERATIONS & JOB S (If applicable)				
CITY OF STRONGSVILLE, STRONGSVILLE, OHIO				

ADDITIONAL INSURED: CITY OF STRONGSVILLE IS COVERED IN RESPECT TO NEWSPAPER VENDING MACHINES IN CITY LIMITS.

NOTICE OF CANCELLATION: (NOT APPLICABLE UNLESS A NUMBER OF DAYS IS ENTERED BELOW). BEFORE THE STATED EXPIRATION DATE THE COMPANY WILL NOT CANCEL OR REDUCE THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNTIL AT LEAST 30 DAYS NOTICE OF SUCH CANCELLATION OR REDUCTION HAS BEEN MAILED TO:

CITY OF STRONGSVILLE
18688 ROYALTON RD.
STRONGSVILLE, OHIO 44136

Pauline Johnson

AUTHORIZED REPRESENTATIVE

1/1/84

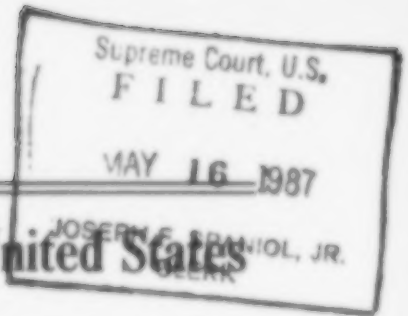
DATE ISSUED

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APPELLANT'S BRIEF

No. 86-1042



In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APPELLANT'S BRIEF ON THE MERITS

HENRY B. FISCHER, Counsel of Record

JOHN H. GIBBON

FREDERICK W. WHATLEY

**WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY**

**1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212**

WILLIAM E. BLACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

**City of Lakewood
12650 Detroit Avenue
Lakewood, Ohio 44107
(216) 521-6580**

*Attorneys for Appellant
City of Lakewood*

QUESTIONS PRESENTED FOR REVIEW

I. Does the First Amendment to the United States Constitution override equal protection requirements and mandate that a municipality must, when renting its property to a private newspaper publisher to erect commercial newsbox vending machines for the advertising and retail sale of newspapers, grant immunity to the publisher from general laws and regulations (e.g., requiring liability insurance and architectural review) which are applicable to other fixed retailers of First Amendment protected material (e.g., stores that sell newspapers, bookstores and movie theaters) and which are applicable to other advertising devices (e.g., signs and billboards), and instead, treat the publisher like a governmental or quasi-governmental body that erects structures on public property to provide essential public services (e.g., utility poles, street signs, phone booths for emergency calls and bus shelters)?

II. Is the First Amendment to the Constitution of the United States violated by an Ordinance which provides for review of the design of newsboxes by a City's Architectural Board of Review when the Board's decision is subject to judicial review and, under statutory standards, may not be illegal, arbitrary, capricious, unreasonable or unsupported by evidence?

III. Is the First Amendment to the Constitution of the United States violated by an Ordinance which directs the Mayor of a City to grant or deny rental applications for placement of commercial newsbox vending machines on City property pursuant to detailed and specific terms as to size, location, term, etc., and such other terms and conditions deemed necessary and reasonable by the Mayor

when any such denial and/or terms and conditions may not be unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by evidence and subjects all decisions of the Mayor to judicial review under such statutory standards?

IV. Does the First Amendment to the United States Constitution grant a property right to persons, especially newspaper publishing companies, whereby they must be permitted to erect newspaper vending machines on City owned property for the sale or distribution of newspapers subject to only regulations generally applicable to the right of personally circulating pamphlets, as in *Lovell v. Griffin*, 303 U.S. 444 (1938), and/or time, place and manner regulations?

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<i>Associated Press v. NLRB</i> , 301 U.S. 103 (1937)	17, 37
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<i>City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	passim
<i>City of St. Louis v. Western Union Telegraph Co.</i> , 148 U.S. 92 (1893)	15, 20, 21

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<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	31
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No. 86-1042

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,
vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APPELLANT'S BRIEF ON THE MERITS

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which appears in the Appendix of the City's "Jurisdictional Statement" (hereinafter "Jur. St."), at A1, et seq. is reported at 794 F.2d 1139 (1986). The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, unreported, is reprinted in the Joint Appendix (hereinafter "J.A."), at 213, et seq.

JURISDICTION

The District Court held that the City of Lakewood's Ordinance permitting the rental of City property for use by newsboxes was constitutional in its entirety (Jur. St. A25, and J.A. 213). On July 10, 1986, the United States Court of Appeals for the Sixth Circuit reversed in part, holding three aspects of the City's Ordinance to be violative of the First Amendment (Jur. St. A1). The Plain Dealer Publishing Company (hereinafter referred to as the "Company" or "Plain Dealer") filed a Petition for Rehearing En Banc which was denied by the Court of Appeals on September 25, 1986 (Jur. St. A40).

The City of Lakewood (hereinafter referred to as the "City") filed its Notice of Appeal to this Court in the United States Court of Appeals for the Sixth Circuit on December 18, 1986 (Jur. St. A42). The Plain Dealer did not cross-appeal or petition for a writ of certiorari. The City's "Jurisdictional Statement" was filed on December 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2). The Court noted probable jurisdiction on March 2, 1987.

CONSTITUTIONAL PROVISIONS AND CITY ORDINANCES WHICH THIS CASE INVOLVES

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Lakewood Codified Ordinances, Section 901.181

Section 901.181 is set forth in its entirety at Jur. St. A43 and J.A. 280.¹

1. The three provisions at issue are:

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms: (a) The term "newspaper dispensing device" as used in this section, shall mean a mechanical, coin operated container constructed of metal or other materials of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.

* * * * *

(c) A rental permit shall be granted upon the following conditions:

* * * * *

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation of each newspaper dispensing device and shall furnish, at the permittee's expense, such public liability insurance as will protect per-

(Continued on following page)

STATEMENT OF THE CASE

Former Lakewood Codified Ordinance Section 901.18 prohibited erecting structures on any "public ground" (Jur. St. A3). On January 5, 1983, the Plain Dealer filed its Complaint alleging that the City's action, in refusing permission for the Company to erect newsboxes on City-owned property, and former ordinance §901.18 were unconstitutional (See, Complaint, J.A. 6).

On August 18, 1983, the Trial Court granted the Company's Motion for Summary Judgment, holding former §901.18 unconstitutional, but holding the matter of a permanent injunction for sixty (60) days to give the City an opportunity to enact new regulations concerning the placement of newsboxes on public property.

While former §901.18 was never applied to any property but the City's,² the undefined term "public ground" included the property of other public entities within the City (e.g., the Regional Transit Authority, the School Board, and the United States Post Office). To clarify the ordinance and forestall further litigation, the City chose to amend its ordinance.

Footnote continued—

mittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

* * * * *

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(Emphasis added).

2. The City did not attempt to apply former §901.18 to an existing newsbox erected on Regional Transit Authority commercial property.

On October 17, 1983, the City adopted two Ordinances, 108-83 and 109-83 (Jt. Exs. 1, 2; J.A. 265, 268), which amended §901.18 and enacted §901.181. Comments about the two ordinances were solicited, and, to meet some of the Company's objections, §901.181 was amended by Ordinance 2-84 on January 3, 1984 (Jt. Ex. 3; J.A. 275). The Company was still not satisfied and filed its Amended Complaint (J.A. 22). The City answered (J.A. 27), and the case was set for trial.

Before the scheduled trial, the New York Times Company (hereinafter referred to as the "Times"), facing criminal charges in the Lakewood Municipal Court for erecting newsboxes in a residential district without a rental permit in violation of §901.181, filed its Complaint and Motion for Preliminary Injunction in District Court Case No. C84-1071 and moved to consolidate its case with the *Plain Dealer* case, which the City opposed. The District Court consolidated the hearing of the Motion for Preliminary Injunction with the trial on the merits of the *Plain Dealer* case.

After trial, the District Court, on July 12, 1984, issued its Memorandum and Order, containing its Findings of Fact and Conclusions of Law in the *Plain Dealer* case (J.A. 213), and also issued its Memorandum and Order, denying the Times' Motion for Preliminary Injunction. On July 19, 1984, the District Court entered judgment for the City and against the *Plain Dealer*, with court costs assessed to the City (J.A. 228).

The *Plain Dealer* and Times filed their respective Appeals from the District Court's decisions. The City cross-appealed from the District Court's order that the City pay the costs. The appeals were consolidated for argument in the United States Court of Appeals for the Sixth Circuit. On April 30, 1986, the Sixth Circuit vacated the decision in the Times' case, remanding the case to the District Court with instructions to dismiss under the doctrine of abstention (Jur. St. A20).

On July 10, 1986, the Sixth Circuit upheld all provisions of §901.181 except: (1) The portion of §901.181 (a) that subjected the design of newsboxes to review by the City's Architectural Board of Review; (2) §901.181(c)(5), which mandated indemnification and liability insurance in the amount of \$100,000.00, with the City named as an additional insured; and, (3) §901.181(c)(7), which granted discretion to the Mayor in granting rental permits. The Company's petition for Rehearing En Banc as to the City's rental fee of \$10.00 per year for each newsbox location and prohibition of newsboxes in residential districts was denied on September 25, 1986 (Jur. St. A40). The *Plain Dealer* did not seek review of that decision.

STATEMENT OF FACTS

1. There Are Several Reasons For Totally Prohibiting Newsboxes On City Property

As expert City Planner David W. Hartt testified, and other testimony and evidence demonstrated, there are many reasons why newsboxes should be totally prohibited from City-owned property (J.A. 165).

A. There are many alternative methods for sell- and distributing newspapers

Lakewood Ordinances, other than zoning provisions, do not regulate newsboxes placed on non-City owned property. Currently (and prior to passage of §901.181), the Company has eleven newsbox sites within the City and two newsbox sites immediately adjacent to the City on non-City owned property (Deft. Ex. BB; J.A. 374, 184, 185; Deft. Ex. DD; J.A. 383, 184).

The subject ordinances have no applicability to the single sale of newspapers by businesses located within the City. Currently (and prior to the passage of §901.181), there are eleven "all-night" businesses within the City and two "all-night" businesses immediately adjacent to the City, that sell the *Plain Dealer* 24 hours a day, seven

days a week (Deft. Ex. AA; J.A. 373, 184, 185). All residents in the City are within 1/4 of a mile from an existing all-night newspaper outlet (J.A. 133; Jur. St. A2).³ Finally, neither §901.18 nor §901.181 regulate home delivery of newspapers, which constitutes 77% of the Company's "daily" sales (J.A. 73-74).

The Company's newsbox sales constitute approximately 4.6% to 5.27% of its total "daily" sales (J.A. 74; Jur. St. A2). On Saturday and Sunday [Sunday being the largest sales day of the week (J.A. 59)], newsbox sales constitute a significantly smaller percentage of total sales. The Company does not stock at least 50% of its newsboxes on the weekends (J.A. 75-76). Newsbox sales only constitute approximately 1.5% (.015) of Sunday sales.

Because of the Company's numerous other channels for selling its paper, Mr. Hartt found no need for erecting newsboxes on City property (J.A. 165).

B. Newsboxes create safety hazards

The most obvious safety hazard of newsboxes was demonstrated by Mr. Thrasher, the Company's Circulation Manager, and Glenn P. Walker, Captain of the Lakewood Police Department. Mr. Thrasher testified that the Company does not care whether people stop their cars along the street to buy a paper from a newsbox, as long as the Company's goal "to sell" newspapers is met:

3. Additionally Mr. Hartt, upon studying the commercial streets of Lakewood, identified 75 potential non-City owned sites for selling the Plain Dealer, either inside or outside local businesses (J.A. 162-163). The use of these 75 potential sites may be problematical, as the Company refuses to pay the owners of the sites for rental of space to erect its newsboxes (just as it has attempted to take City property rent free) (J.A. 184). Moreover, all of the Company's proposed sites in the City's commercial districts meet the dimensional requirements set forth in §901.181 (J.A. 117; Deft. Ex. CC; J.A. 373-382, 184-186), but the Company has not applied for rental permits to erect its newsboxes on City property (J.A. 83).

4. "Daily" sales mean sales made Monday through Friday.

Our main intent is to sell to the commuters and pedestrians. If people want to stop their car and buy the paper fine.

J.A. 89 (emphasis added).

Captain Walker, however, testified that cars stopped during rush hours create additional congestion and cause rear-end accidents (J.A. 124-125). Captain Walker personally observed vehicles stopping in front of newsboxes and passengers or drivers exiting the vehicles to purchase papers from the newsboxes located on Clifton Boulevard in Cleveland, Ohio (J.A. 124-125, 128). These vehicles were stopped despite no-stopping ordinances in effect on Clifton Boulevard (J.A. 128). The stopped vehicle caused other vehicles to swerve to avoid them or to "back up" behind them (J.A. 128).⁵

Other safety hazards created by newsboxes were discussed by Frank Ziegenruecker, the City's Superintendent of Streets. The City averages four reports per day of accidents occurring off City streets but within public rights-of-way—the Company's proposed newsbox locations (J.A. 142). Included in these accidents are bicycles striking objects such as mailboxes or utility poles, persons tripping on sidewalks and falling against objects placed near the sidewalks, or pedestrians walking into traffic control devices (J.A. 142). The City receives daily reports of pedestrians tripping and falling on its sidewalks and reports of pedestrians striking items placed near its sidewalks approximately once a month (J.A. 145-146). The probability of such accidents increases as more structures are erected on, or adjacent to, sidewalks.

If objects located on City property are not properly anchored, upon being struck by a vehicle they become missiles or projectiles and could injure persons and/or property within the City (J.A. 144). Over a two-year

5. Additionally, newsboxes erected along roadways cause sight obstructions (J.A. 128).

and three-month period, 65 objects (or approximately 30 objects per year) placed in the City's rights-of-way were struck by vehicles (J.A. 144).⁶

City Planner Hartt viewed newsboxes erected in other cities and observed the safety problems caused by newsboxes: (1) Restricting pedestrian traffic; (2) Blocking ramps for the handicapped; (3) Not allowing parked cars to open their doors; and, (4) Being too near fire hydrants (J.A. 151-154, *see also*, Deft. Exs. GG-1, 2, 3, 5, 7, 9; J.A. 391-393, 184-186). Mr. Hartt also stated that obstructions placed in public rights-of-way adjacent to roadways will slow traffic, and, as the number of such obstructions increases, a tunnel effect is created, causing drivers to pull away from the obstructions and into the next lane of traffic (J.A. 157-158). Finally, increased obstructions between streets and sidewalks reduce pedestrian access to both.

C. Newsboxes create esthetic hazards

The esthetic problems caused by newsboxes include the visual clutter of: (1) Several newsboxes placed together without regard to their color or design; (2) Newsboxes randomly placed on sidewalks; and, (3) Litter collecting underneath or around the boxes (J.A. 151-154, *see also*, Deft. Exs. GG-1, 2, 3, 5, 7, 9, cited above). The Company has provided for maintenance of its newsboxes and/or cleanup around its newsboxes only once a year (J.A. 93), and some of its employees responsible for newsboxes will not clean up anything around the newsboxes (J.A. 93).

Esthetically, it is necessary for the City to harmonize the color and design of objects placed in its rights-of-way (J.A. 168-169). All construction within the City is subject to architectural review, including other objects of similar size (e.g., fences and business, directional and informational signs, J.A. 159).

6. This number does not include the number of fire hydrants struck by vehicles (J.A. 145).

D. Newsboxes permanently occupy City property for commercial purposes

i. Newsboxes permanently occupy property

When a newsbox is erected on City property, it is chained to a fixed object or a concrete block is put in its base to affix it to its location (J.A. 90). The dimensions of a newsbox are: 49" high x 19" wide x 16-1/4" deep (J.A. 92). Newsboxes are left at their sites permanently, or until the Company determines that a site is not profitable (J.A. 81). Newsboxes necessarily dispossess the City's residents from the portion of City property where they are erected.

ii. Newsboxes are profit making commercial ventures and advertisements

Newsboxes are used as business ventures, not for purposes related to the public health, safety and welfare (J.A. 160, 171-172). They are used solely to increase the circulation of the paper, thereby increasing the Company's revenues from advertisers (J.A. 62, 85). The Company's only basis for choosing a particular newsbox site is projected sales. If a newsbox does not generate enough sales, it will be removed (J.A. 81).

The Company's name and logo are prominently displayed on newsboxes (J.A. 87-88), and placards on the front of newsboxes advertise contests and/or features in the newspaper (J.A. 87). Because of their function as advertisements, newsboxes further the monetary interests of the Company even if passers-by do not purchase papers from them (J.A. 86).

iii. Newsboxes are inconsistent with the current uses made of City property

Mr. Hartt testified that the two primary functions of a city thoroughfare are: (1) The safe and efficient movement of vehicular and pedestrian traffic; and, (2) Placement of essential public utilities and services related to the health, safety and welfare of the residents of the

City (J.A. 171-172). Objects lawfully located on the City's sidewalks and tree lawns consist of: (1) Trash receptacles; (2) Fire hydrants; (3) Utility and other poles for street and traffic lights, telephone and electric service to the City's residents and street signs; (4) Bus shelters; and, (5) Public telephones (J.A. 161-162, 171-172).⁷ All of these objects are very much related to protecting the health, safety and welfare of the City's residents, or they provide essential public services (J.A. 161-162, 171-172), and may be classified as governmental or quasi-governmental fixtures owned by governmental subdivisions of the state or public utilities. The Company is not a subdivision of the state or a public utility, it does not provide essential public services of a governmental or quasi-governmental nature, and its newsboxes are not related to the public health, safety or welfare (J.A. 172).

Mayor Sinagra testified that telephone booths are strategically placed in the tree lawn areas of the City as part of the City's free emergency communications network (no coins needed) for police, fire, ambulance, and related calls (e.g., to a garage or home) (J.A. 179-180). Bus shelters, which protect residents from inclement weather, are placed in public rights-of-way pursuant to individual ordinances (J.A. 180).

2. The Ordinal Provisions At Issue Attempt To Minimize The Harm And Risks Caused By Newsboxes

The City attempted to accommodate newsboxes, while ameliorating their adverse impact on the entire City, by enacting (and amending, pursuant to requests by the Company) §§901.18 and 901.181.⁸ Within the 60-day period

7. It should be noted that there are no "alternative channels" for providing: (1) Electricity; (2) Telephone service; (3) Shelters from inclement weather; (4) Emergency communication; (5) Traffic control devices; (6) Water to fight fires; and, (7) Receptacles for litter.

8. Mr. Hartt's opinion that newsboxes should be totally prohibited on City property was based on a later detailed study undertaken in preparation for trial.

noted above, these sections were prepared by the City Law Department and Special Counsel and were reviewed at a cabinet meeting by all Department heads prior to submission to, and passage by, City Council (J.A. 176).

Section 901.18 prohibits the erection of any structure on any public property except with the owner's permission and where permitted by State Statutes and City Ordinances. This Section also provides that any person seeking exclusive use of City property must enter into a rental agreement with the City for such exclusive use of its property.

Section 901.181 applies only to newsboxes placed on City property, and is *absolutely content neutral*. It does not regulate the Company's *newspaper* in any way. Mr. Hartt gave uncontroverted testimony that the subject ordinance is the least restrictive means for regulating newsboxes and that it should be *more* restrictive (J.A. 156).⁹

A. The City's requirement of insurance and indemnity

Section 901.181(c)(5) provides that the Company must indemnify the City and provide insurance, naming the City as an additional insured, in the amount of \$100,000.00 for personal injury and property damage. The statutory (Ohio Revised Code, hereinafter "O.R.C.", §723.01) and common law of Ohio mandate that the City maintain its streets, sidewalks and public ways free of nuisances or it will be held liable for any injury or damage occasioned by its failure. The Company already has newsbox insurance for this purpose, covering itself and other named municipalities, in the amount of \$1,000,000.00 (Deft. Ex. JJ; J.A. 401-411, 184, 187).

9. Mr. Hartt testified that the Ordinance should be more restrictive as to its anchoring and locational requirements (J.A. 156-157).

B. The City's requirement of design review by the Architectural Board of Review

Section 901.181(a) provides, in pertinent part, that the design of newsboxes be subject to review by the City's Architectural Board of Review. Because of the esthetic harm caused by unregulated newsboxes, their design must be regulated (J.A. 168-169).

Robert Phinney, Chairman of the City's Architectural Board of Review, testified about the Board's discretion, noting that there are not exact standards for every design presented to the Board (J.A. 103). The Board has attempted to avoid propounding a stringent set of written standards as it believes such standards would be too restrictive on applicants (J.A. 113). After review of the proposed structure, site and surrounding property, the Board, using professional architectural standards [two members of the Board are architects (J.A. 113)], makes its decisions giving the benefit of all doubt to the applicant (J.A. 113).

The limits of the Board are found in §1325.03 of the Lakewood Codified Ordinances (Deft. Ex. EE, "Architectural Standards Workbook"; J.A. 184-187, not reproduced because of difficulty in reproducing it in conformity with the format of the Joint Appendix), and are read at every public meeting of the Board (J.A. 114-115). Section 1325.03 provides, in pertinent part, as follows:

The purposes of the Architectural Board of Review are to protect the value, appearance, and use of property on which buildings are constructed or altered to maintain a high character of community development, to protect the public health, safety, convenience, and welfare, and to protect real estate within the City from impairment or destruction of value.

All new structures erected within the City—including signs, movie theaters, bookstores and churches—are subject to the same review, under the same standards (J.A. 105), as

are newsboxes. Should an applicant be dissatisfied with a decision of the Board, O.R.C. §2506.01, et seq. (Jur. St. A48) provides for appeal to the Ohio state courts. Pursuant to O.R.C. §2506.04 (Jur. St. A50), any such review would necessarily include claims that the decision appealed from was arbitrary, capricious, unreasonable, unconstitutional, illegal or unsupported by the evidence on the record.

C. The City's requirement of Mayoral approval of newsbox sites

Section 901.181 provides that the Mayor "shall" grant the application for a rental permit or state his reasons for denial; that the permit be granted upon certain stated conditions and "other terms and conditions deemed necessary and reasonable by the Mayor" [(c)(7)]; and, that, upon an applicant's request, the Mayor's decision will be reviewed by Council, which is empowered "to reverse, affirm, or modify" his decision [(e)].

As provided in §901.181, the Mayor must grant a permit for rental of City property when the applicant complies with the ordinance. The Mayor cannot refuse to issue such a rental permit except for reasons relating to the health, safety and welfare of the City's residents or private interference with public use of City property. Evidence of intent to this effect was offered at trial (J.A. 177).¹⁰ Obviously, some discretion is necessary since it is not possible to foresee all hazards of each potential newsbox site within the 5.5 square miles of the City. Each site and its setting is different.¹¹ Moreover, §901.181 is not, and was not in-

10. This intent is also set forth in §901.181(b) which states, in pertinent part, that newsboxes shall be placed in locations "... determined by the Mayor not to cause an undue health or safety hazard, interfere with the right of the public to the proper use of the streets and thoroughfares, or cause a nuisance. . ."

11. The different characteristics of each of the Company's proposed newsbox sites are illustrated in Deft. Ex. CC, cited above.

tended to be, a lease agreement setting forth all necessary conditions for renting City property. As pointed out at trial, the subject ordinances did not address the placement of newsboxes in ramps for the handicapped (J.A. 166) and how newsboxes are to be anchored (J.A. 156-157). Some discretion is required so that the City may implement the provisions and intent of §901.181, while addressing unforeseen circumstances, just as discretion would be allowed to any property manager authorized to rent property for other uses, such as a bookstore, theater or church.

Should an applicant be dissatisfied with the Mayor's decision, he may appeal to City Council. Should the applicant be dissatisfied with City Council's decision, the same appeal procedure provided by O.R.C. §2506.01, *et seq.*, outlined in the preceding section is available.

SUMMARY OF ARGUMENT

In the first of the five major divisions of the Argument, Section I, the City presents its analysis of the fundamental constitutional and legal principles that govern the establishment of property rights and uses, whether First Amendment related or otherwise, of City real property. In this section, the standard suggested by the City for judging the constitutionality of the admittedly content neutral ordinal provisions in question is also presented.

The position of the City is that no person, a newspaper publishing company included, has a constitutional right to erect structures, newsboxes included, on City property for any purpose, including selling newspapers. The flaw of the lower Court opinion is applying *Lovell v. Griffin*, 303 U.S. 444 (1938), a case dealing with the constitutional right to personally, and transiently, circulate religious pamphlets, to this case, which deals with machines permanently occupying City property. The placement of newsboxes on City property is a permanent, not temporary,

occupation of property whereby space for purposes of highway and personal travel is wholly lost to the public. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), relied upon in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Newsboxes, as permanent retail sales structures, are not equal to persons walking through a city distributing literature. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

The Constitution does not create property rights in city-owned property, rather, these rights and their dimensions are defined by existing rules or understandings that stem from an independent source of law. *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Thus, only the City may create a lease-hold interest in City property.

The nature, value, abuse and dangers of newsboxes erected on City property pose substantial problems. Accordingly, the City's provisions establishing the conditions for granting a governmentally created property right must be judged by balancing the conditions' infringement (if any) on Appellee's First Amendment rights against the City's interests protected by the conditions. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The City's conditions do not infringe on the Company's First Amendment rights while the City has substantial interests in esthetics, and the public health, safety and welfare.

In Section II of the Argument, the City explains why its interest in indemnification and having liability insurance covering newsboxes (with the City named as an additional insured) are substantial, necessary and constitutional.

The cost of providing insurance is merely a cost of doing business. Such a cost should be recovered in the price and profits of newspapers, not by taxing the City's residents.

Items currently located on City sidewalks and tree lawns directly relate to the public health, safety and welfare, are owned by public utilities or political subdivisions of the state, and have no alternative channels available to provide their services. Newsboxes, on the other hand, are not similarly situated because the sale of newspapers is not directly related to the public health, safety or welfare, the private Company is not a public utility or political subdivision, and there are more than adequate alternative channels for the Company to sell its newspapers. The Constitution does not require things which are different in fact to be treated in law as though they are the same. *Tigner v. Texas*, 310 U.S. 141 (1940). The fact that the City does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services. *Plain Dealer Pub. Co. v. City of Lakewood*, 794 F.2d 1139, 1152 (1986), concurring opinion (Jur. St. A19).

In Section III of the Argument, the City demonstrates that its interest in esthetics is substantial and that the Architectural Review requirement is necessary, governed by sufficient standards, and constitutional. In *Taxpayers for Vincent*, the Court held that esthetic interests are substantial enough to justify a total ban against posting temporary political signs on public poles in the very same areas that the Company seeks to place its newsboxes. Just like political signs and billboards, newsboxes are substantive, visual evils in themselves and can be prohibited. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); and *Taxpayers for Vincent*, 466 U.S. at 806-807.

The City ordinances require the Architectural Board of Review to review the design of structures within the City to protect the value, appearance and use of property, maintain a high character of community development, protect the public health, safety and welfare and values of real estate within the City. The Board makes its de-

cision professionally after review of the proposed design, site and surrounding properties. Decisions of the Board are subject to judicial review under O.R.C. §2506.01, *et seq.*, and O.R.C. §2506.04, which provides that the Board's decisions may not be arbitrary, capricious, unconstitutional and/or against the weight of evidence. The City's standards are similar to those upheld in *Reid v. Architectural Board of Review*, 119 Ohio App. 67 (Cuyahoga County App. Ct., 1963).

All structures erected within the City are subject to architectural review and publishers are not immune from this generally applicable law. *Associated Press v. NLRB*, 301 U.S. 103 (1937) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976). It would be an anomalous situation for bookstores, theaters and churches to be subject to architectural review, while allowing visually blighting newsboxes to be erected in front of these establishments.

In Section IV of the Argument, the City shows that it has a substantial interest in vesting sufficient discretion in its Mayor to establish reasonable conditions for the placement of newsboxes in order to protect the health, safety, welfare and property of the City. The requirement governs such discretion sufficiently and is constitutional.

The Mayor may not deny an application for a rental permit without stating his reason and may only require additional conditions which are reasonable and necessary to further the purposes of the ordinance, including protecting the public health, safety, welfare and property. All decisions of the Mayor are subject to appeal to City Council and Judicial Review pursuant to O.R.C. §2506.01, *et seq.* Additionally, such decisions must meet the standards of O.R.C. §2506.04 and cannot be arbitrary, capricious, unconstitutional and/or against the weight of the evidence.

Some discretion is necessary, since Council cannot possibly foresee all possible hazards and conditions at all

possible newsbox sites within the 5.5 square miles of the City. There is nothing in the Constitution that disables a Mayor from acting to avert, on content neutral grounds, what he perceives to be a clear danger to the public health, safety, welfare and property. *Greer v. Spock*, 424 U.S. 828 (1976).

Where there are no regulations to guide employees in granting newsbox rental permits, but there is no evidence that the permitting authority had ever arbitrarily denied newsbox permits or imposed unreasonably discriminatory terms, there is no justiciable controversy with respect to the reasonableness of the terms. *Gannett Satellite Inf. Net. v. Metro Transp. A.*, 745 F.2d 767 (2nd Cir. 1984). Here, not only is there no evidence of an arbitrary denial or unreasonable or discriminatory terms, but there are substantial, content neutral and constitutional standards with provisions for judicial review of any decision applying the standards.

In Section V of the Argument, the City demonstrates that, assuming *arguendo* the Court finds a First Amendment right for a person to permanently occupy city property by erecting newsboxes, §901.181's requirements do not violate the First Amendment. The Company's activity of selling newspapers, via newsboxes, clearly combines "conduct" and "speech" and the requirements at issue are constitutional under *United States v. O'Brien*, 391 U.S. 367 (1968) and *Taxpayers for Vincent*.

Moreover, the requirements are content neutral, narrowly tailored to serve substantial governmental interests and leave open ample, alternative channels for selling newspapers. They do not violate the First Amendment under the standards applied in *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) and *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981).

ARGUMENT

I. NO PERSON HAS A CONSTITUTIONAL RIGHT TO ERECT NEWSBOXES OR ANY OTHER STRUCTURE ON CITY PROPERTY FOR ANY PURPOSE, INCLUDING THE SALE OF NEWSPAPERS

The fatal flaw of the Circuit Court's analysis of the subject ordinal provisions can be found in its first sentence—and the cases it cites (Jur. St. A8). The Court begins its analysis by holding that publishers have a First Amendment right to erect and affix structures on city property from which to sell newspapers, citing: *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984); *Lovell v. Griffin*, 303 U.S. 444 (1938); and, *Hull v. Petrillo*, 439 F.2d 1184 (2nd Cir. 1971). The analysis of these cases, however, is inapposite to machines permanently occupying City property in order to sell newspapers.

In reverse order, *Hull* dealt with persons selling a Black Panther newspaper on city streets. *Lovell* dealt with Alma Lovell personally circulating a religious pamphlet. The only newsbox case cited by the Court was the *Miami Herald* case. Significantly, *Miami Herald* held that selling newspapers via newsboxes was a First Amendment right—citing *Lovell* and *Hull* (*Miami Herald*, 734 F.2d at 673). Indeed, the analysis of all newsbox cases upholding such a right starts with one case—*Lovell v. Griffin*.

The City submits that, while the First Amendment guarantees a right of access to public property, it does not guarantee a right of appropriation of public property. Simply stated—Alma Lovell can peripatetically sell the "Golden Age" virtually regulation free. But, she cannot build a shanty on city sidewalks from which to sell the "Golden Age" without the city's permission. And, if the

city chooses to allow her to erect and affix a structure on city property, it may exact a rental fee and make its permission subject to reasonable, content neutral conditions.

A. The Placement Of Newsboxes On City Property Is A Permanent Occupation Of Property

The difference between "permanent occupation" of public property and "temporary access" to public property is the foundation of any analysis of the issues presented in this case. The Company proposes to erect its newsboxes upon specific portions of City property and leave them there, dispossessing all others, in perpetuity or until the Company deems the location unprofitable. In *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893),¹² the Court held that the City of St. Louis' property was "taken" by the Western Union's telegraph poles permanently occupying city property:

The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveler, whether on foot or in a vehicle passes to and fro along the streets, and his use and occupation thereof are temporary and shifting . . . But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of

12. This case, and its definition of "taking", was relied upon by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the CATV Corp. was found to have "taken" property when it placed 36 feet of cable, one-half inch in diameter, and two 4" x 4" x 4" metal boxes on plaintiff's apartment building (*Id.* at 443). It was held that a "taking" is not dependent upon the size of the area permanently occupied, but, instead, is determined by the permanence of the physical occupation (*Id.* at 434).

transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public.

Id. at 98-99 (emphasis added). A newsbox erected on city property, just like a telegraph pole, ". . . permanently dispossesses the general public as if it had destroyed that amount of ground."

In the context of private property, this Court has long distinguished between a temporary use of property and a permanent occupation of property (See, generally, discussion in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426-442). Thus, states may require that private property owners allow individuals to temporarily exercise their free speech and petition rights on private property [*PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980)], or the Federal Government may require that employers allow union organizers limited, temporary access to private property [*Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972)]. But, no governmental unit can mandate the permanent occupation of private property without compensation.

The reason for this distinction is that temporary access to property is a limited yielding of an owner's property rights. A permanent occupation of property, on the other hand, "chops" through the "bundle" of the owner's property rights, "taking a slice of every strand" from the owner by dispossessing him from the occupied property (*Loretto*, 458 U.S. at 436).

In the context of certain public property, the fact that the property is public militates for wider "access" (i.e., temporary use) by those who wish to personally exercise their First Amendment rights. The very fact that it is the public's property, however, militates against any person appropriating such property for his sole and exclusive use, dispossessing all others (including those who would

exercise their First Amendment rights) from that property. As stated in *Adderley v. Florida*, 385 U.S. 39 (1966):

[A city], no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Id. at 47-48.

B. A Permanent Occupation Of Property Should Not Be Analyzed As A Temporary Access To Property

What the Company seeks, unfettered, exclusive use of City property, is not analogous to "Free Speech" as defined by traditional First Amendment analysis and the temporary use of city property. Typically, the Court has dealt with transient dissemination of information in its analysis of access to certain public property.¹³ There is, however, nothing temporary or transient about the Company's manner of selling its newspapers by newsboxes. The Company proposes to erect structures on City property in perpetuity (or until the Company deems them unprofitable) from which to sell its papers.

Newsboxes, as permanent retail sales structures, are not equal to persons walking through a city distributing literature [See, *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)]. Recently, in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court discussed the difference between persons handing out literature, and "speech" left unattended on City property.

In *Vincent*, the campaign committee attempted to equate posting political signs on light poles to leafletting, relying on *Schneider v. State*, 308 U.S. 147 (1939). *Schneider*, however, has no application to "speech" left on public property:

13. Traditional First Amendment analysis of access to city streets and sidewalks has dealt with the temporary use of public properties for leafletting, pamphleteering, picketing, proselytizing, etc.

The rationale of *Schneider* is inapposite in the context of the instant case. . . . There individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed.

Vincent, 466 U.S. at 809. Just like posting temporary political signs on public property, permanently erecting vending machines on City property is not equal to transiently disseminating information.

Thus, newsboxes, as machines permanently occupying City property, are different from persons peripatetically exercising their First Amendment rights on city property. This difference renders inapposite traditional First Amendment analysis, as expressed in *Lovell* and its progeny [e.g., *Schneider*, 308 U.S. 147; *Hague v. CIO*, 307 U.S. 496 (1939); *Murdock*, 319 U.S. 105; *Martin v. Struthers*, 319 U.S. 141 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); and, *Staub v. Baxley*, 355 U.S. 313 (1958)].¹⁴

C. The Constitution Does Not Create Property Rights In City-Owned Property

The placement of newsboxes on City property is a permanent occupation of property. Such a permanent occupation of property cuts through the City's "bundle of property rights" and gives the Company a "slice" of every "strand" of the City's "bundle". Thus, the initial question to be answered is: Does any provision of the United States Constitution give the Company such rights in City property? The answer is, no.

It is fundamental law that the Constitution of the United States does not create property rights, "[r]ather,

14. Similarly, all lower court decisions applying the *Lovell* analysis to newsboxes are fatally flawed [e.g., *Miami Herald Pub. Co. v. City of Hallendale*, 734 F.2d 666].

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . .” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) [See also, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)].

The only authority permitting Appellee to apply for a lease-hold interest in City property is the City. The Circuit Court recognized that Appellee has no “First Amendment Property Right” in City property by upholding the City’s \$10.00 per year rental fee for each newsbox location.

D. Laws Regulating The Rental Of City Property For Newsboxes Must Reflect The Nature, Value, Abuse And Dangers Of Newsboxes

Each method of communicating ideas is “a law unto itself” and that law must reflect the “differing natures, values, abuses and danger” of each method.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981).

Different concerns relative to different methods of communication necessitate different treatment by regulatory bodies. Such different treatment has been explicitly upheld by the Court. Just as the laws governing radio, television, theaters, bookstores, billboards, picketing, etc. reflect different interests, laws regulating newsboxes must reflect different interests.

1. The nature of newsboxes is that they permanently occupy property for commercial purposes

(a) Newsboxes are permanent occupiers of City property

The subject ordinances’ aim is to insure that City property is used for the benefit of all, not just for the benefit of the Company. The problems created by newsboxes are directly related to the finite resource newsboxes occupy, i.e., portions of the City’s tree lawns and sidewalks. The City has made a conscious decision to regulate the use of

this finite resource for the public interest. Regulating a finite public resource for the public interest is constitutional [See, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)].

The functions of City streets are: (1) Efficient movement of vehicular and pedestrian traffic; and, (2) Providing essential public utilities and services related to the public health, safety and welfare.

As a Charter Municipality under Article XVIII, Section 3 of the Ohio Constitution,¹⁵ the City may only lease its property to private persons or entities if: (1) The property is no longer needed for municipal purposes;¹⁶ or, (2) The proposed private use of City property does not interfere with the public’s use of City property.¹⁷ Clearly, the City’s sidewalks and public rights-of-way are needed for public purposes.¹⁸ Thus, the City must closely regulate the Company’s use of City property to ensure that it does not interfere with public use of City property.

(b) Newsboxes are profit-making fixed retailers and advertisements

As demonstrated at trial, a newsbox is a miniature, mechanized bookstore. It advertises its wares by con-

15. For non-charter municipalities and charter municipalities with no provisions for renting their property, O.R.C. §723.121 (reproduced in the Appendix hereto, at A1) provides that “sidewalks” and “public grounds” can be rented to private entities provided that: (1) The property “is not needed” by the City; (2) All “plans and specifications” for “structures” and the “contemplated use” of City property are approved by the City; and, (3) The City may require indemnity agreements as it deems necessary.

16. *State, ex rel. Leach v. Redick*, 168 Ohio St. 543 (1959); and, *Hugger v. City of Ironton*, 83 Ohio App. 21 (Lawrence Co. App. Ct. 1947), appeal dismissed, 148 Ohio St. 670 (1947).

17. *Richard Boiles & Engine Co. v. Toledo*, 6 Ohio C.C. (n.s.) 501 (Lucas Co. Cir. Ct. 1903); and, *State v. Mills*, 20 Ohio N.P. (n.s.) 427 (Clark Co. Com. Pls. Ct. 1918).

18. This need may demand that the property not be used (e.g., open spaces for esthetics in residential districts).

spicuously advertising its publisher and contests or features within its product and mutely solicits sales for profit. Such a function clearly distinguishes it from a solicitor for charitable, political, and/or religious organizations.

In *Breard v. Alexandria*, 341 U.S. 622 (1951), the Court sanctioned the total prohibition of door-to-door solicitors of magazine subscriptions. The Court discussed the extent to which *Breard* differs from *Schneider*, 308 U.S. 147, and *Thomas v. Collins*, 323 U.S. 516 (1945), in *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620 (1980). The distinguishing factor in *Breard* was that the solicitors were working for profit-making corporations. *Id.* at 632. As stated in *Packard v. Banton*, 264 U.S. 140 (1924):

The streets belong to the public, and are primarily for the use of the public in the ordinary way. *Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper.*

Id. at 144 (emphasis added). Thus, the private, commercial aspects of the Company's newsboxes further distinguish them from those who personally, and transiently, solicit for charitable, political, and/or religious organizations.

As an advertisement, with its product prominently displayed on its exterior and attached placards, the newsbox is a small billboard. Because of a newbox's design as an advertisement, it furthers the commercial interests of the Company even if passers-by do not purchase papers from it. To paraphrase the Supreme Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490:

But whatever its communicative function, the [newsbox] remains a "[small] immobile, and permanent structure which like other structures is subject to . . . regulation."

Id. at 502 (citations omitted).

2. The value of newsboxes as disseminators of ideas is minimal

Newsbox sales account but for a small fraction of daily sales of newspapers, and weekend newsbox sales are almost negligible. The Plain Dealer sells its paper from newsboxes on private property and at various stores throughout the City. Every City resident lives within 1/4 mile of an all-night newspaper outlet and the Company's newspaper is home delivered by newspersons or mail. Clearly, the Company has more than an ample opportunity for expressing its ideas by alternative methods of distribution, which have potential for expansion.

3. The potential for abuse of City property by newsboxes is great

Appellee's newsboxes' potential for abusing City property is substantial. When evaluating this potential, however, the Court should take into consideration all companies that sell their publications via newsboxes [See, *Regan v. Time, Inc.*, 468 U.S. 641, at 657, n.12 (1984)].

The problems of newsboxes abusing city property is a nationwide phenomena. As noted in an article published by the American Planning Commission:

Glenn Erikson, the downtown plan coordinator for the city of San Francisco, notes, ". . . It's not unusual to see 20 machines chained to each other in a row, totally blocking pedestrian movement."

"We spent \$30 million to fix up Market Street," Erikson adds, "and the news shacks and the vending machines just came in and took over the whole area. They look atrocious." Erikson's frustrations reflect a serious problem. The indiscriminate and uncoordinated proliferation of newspaper vending machines can have serious consequences for public right-of-way, urban design, and property defacement.

Longhini, *Coping With High-Tech Headaches*, 50 Planning Contents, No. 3, March 1984, at 28 [this article was offered

as Deft. Ex. II (J.A. 185) and was refused admittance as an exhibit by the Court (J.A. 186)—relevant portions reproduced for the Court's convenience at J.A. 394-399]. As can be seen, there is great potential for abuse of City property by newsboxes.

4. The dangers of newsboxes are the safety and esthetic hazards and damages they cause

The uncontroverted testimony at trial demonstrated the safety hazards associated with the erection of newsboxes adjacent to City streets (See, "Statement of Facts", Section 1.B., pp. 6-8).

The uncontroverted testimony at trial also demonstrated the esthetic hazards created by newsboxes (See, "Statement of Facts", Section 1.C., p. 8). The esthetic damage caused by newsboxes has been the subject of nationwide concern:

Planners and public officials throughout the country are unanimous in damning news vending machines.

* * * * *

Bob Bach of the Dallas planning department summed up a number of planners feelings about this neglect: "The city of Dallas has very good streetscape design standards. When we devised these standards a few years ago, we tried to accommodate newspaper vending machines. We proposed freestanding, modular units of uniform height and size, grey in color with white lettering, secured into the concrete. It's a very attractive design. The two Dallas papers, the *Morning News* and the *Times Herald*, were happy to accommodate us. Then the Houston papers and *USA Today* came in and totally ignored our standards . . .

Longhini, *Coping With High-Tech Headaches*, supra, at J.A. 395-396. Thus, as demonstrated at trial and recognized nationwide, newsboxes cause safety and esthetic hazards.

E. The Provisions Of Ordinance 901.181 Are Constitutional Conditions For Granting A Governmentally Created Property Right

Clearly, the nature, value, abuse and dangers of newsboxes dictate that they not be treated as persons transiently distributing information. Because "[d]ifferent communications media are treated differently for First Amendment purposes" [*Los Angeles v. Preferred Communications*, 476 U.S. . . ., 90 L. Ed. 2d 480, 488, J. Blackmun concurring (1986)], the critical issue in this case is: What standard or analysis is applicable to ordinances regulating the rental of City property for newsboxes? The City submits that its ordinances grant a temporary property right, and they should be analyzed as such.

1. The subject provisions are conditions for granting a governmentally created property right and must be judged by the Pickering balancing test

Only the City has the authority to grant the Company property rights, such as a lease-hold interest, in City property. The conditions placed on granting this right should be analyzed just as the conditions placed on granting other governmentally created property rights are analyzed.

Such an analysis has been applied to tax exemptions [*Speiser v. Randall*, 357 U.S. 513 (1958)], unemployment benefits [*Sherbert v. Verner*, 374 U.S. 398 (1963)] and welfare payments [*Shapiro v. Thompson*, 394 U.S. 618 (1969)]. Most often, however, this analysis has been applied to governmentally created property rights in public employment¹⁹ [See, cases cited in *Perry v. Sindermann*, 408 U.S. 593, at 597 (1972) and *Connick v. Myers*, 461 U.S. 138, at 144-147 (1983)].

19. Public employment has traditionally been viewed as a "public benefit" [See, *Elrod v. Burns*, 427 U.S. 347, 360-361 (1976)]. An interest in a governmentally created benefit is a "property" right if rules have been established supporting a claim for entitlement to the benefit [*Perry v. Sindermann*, 408 U.S. 593, 601 (1972)].

This analysis begins with the basic premise—and this Court should so hold—that the Company has no inherent “right” to rent City property (*Perry*, 408 U.S. at 597). Once the property right has been created, however, it cannot be conditioned on unconstitutional grounds [See, *Connick*, 461 U.S. at 142; and, *Pickering v. Board of Education*, 391 U.S. 563 (1968)]. To determine whether the condition is constitutional, this Court’s task, as explained in *Connick*, is to apply the *Pickering* balancing test. In the instant case, to paraphrase *Pickering*, the test would consist of balancing:

The interests of the [lessee] as a citizen, in commenting upon matters of public concern and the interest of the [City], as a [lessor], in [providing essential public services for, and protecting the health, safety and welfare of, its residents and ensuring that private use of City property does not interfere with public use of City property]. —

Pickering, 391 U.S. at 568 (See also, *Connick*, 461 U.S. at 142).

The City’s conditions for granting a property right have nothing whatsoever to do with the Company’s ability to comment on matters of public concern. The subject ordinal provisions are totally content neutral and the Company has never argued otherwise. As such, the ordinal provisions do not, in any way, effect any of the Company’s First Amendment rights.

2. There is no infringement of First Amendment rights on the Company’s side of the Pickering scale

All cases invalidating (or upholding) conditions for denying a governmentally created property right are based on the principle that the conditions cannot control the content of the grantee’s speech (on issues of public concern), religious beliefs and/or rights of association.²⁰

20. It was implicitly held that the First Amendment protection afforded grantees of governmentally created property
(Continued on following page)

It is clear that a grantee of a governmentally created property right has a protected right to say what he wants to say on public issues [or be curtailed in a content neutral fashion; see, *CSC v. Letter Carriers*, 413 U.S. 548 (1973)], to believe as he wants to believe and to associate with whom he wants to associate. The City’s conditions on granting property rights for newsboxes in no way infringe on these rights. The Company may say what it wants to say (on any issue, with no curtailment whatsoever), may believe as it wants to believe and may associate with whom it wants to associate.

Therefore, on the “lessee’s” side of the *Pickering* balancing scale, there is no infringement on the Company’s interest in free speech. On the other side of the scale, however, are the weighty interests of the City.

3. There are substantial interests in esthetics and the public health, safety and welfare on the City’s side of the Pickering scale

Clearly, the basic goals of the ordinal provisions are: (1) To protect the public health, safety and welfare and protect the public use of City property; and, (2) To maintain property values and further upgrade the appearance of the City.

Footnote continued—

rights is content based in *Branti v. Finkel*, 445 U.S. 507 (1980): “If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.” *Id.* at 515.

Thus, a governmental unit cannot condition a property right upon: (a) Taking an oath denying past affiliations with Communists [*Wieman v. Updegraff*, 344 U.S. 183 (1952)]; (b) Previous membership in a particular party [*Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961)]; (c) Openly criticizing one’s employer [*Pickering*, 391 U.S. 563]; (d) Openly disagreeing with one’s employer [*Perry*, 408 U.S. 593]; (e) Privately criticizing one’s employer [*Givhan v. Western Line Consolidated Schools*, 439 U.S. 410 (1979)]; (f) Being a member of a specific political party [*Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti*, 445 U.S. 507]; or, (g) Religious beliefs [*Sherbert v. Verner*, 374 U.S. 398 (1963)]. A governmental unit can, however, condition the granting of a property right on: (a) Non-participation in partisan politics [*CSC v. Letter Carriers*, 413 U.S. 548 (1973)]; and, (b) The content of an employee’s speech not relating to issues of public concern [*Connick*, 461 U.S. 138].

As stated in *Metromedia, Inc. v. San Diego*, 453 U.S. 490:

Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals.

Id. at 507-508 [See also, *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981)]. Ordinances dealing with safety and esthetic concerns are well within the proper scope of a City's regulatory and police powers [See, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); and, *Berman v. Parker*, 348 U.S. 26 (1954)]. Indeed, evidence of intent to control traffic or advance esthetic interests need not be proffered, as such intent may be inferred as a "matter of law" (See, *Metromedia*, 453 U.S. at 556).

II. THE CITY'S INTEREST IN INDEMNIFICATION AND HAVING INSURANCE ON NEWSBOXES AND ITSELF IS SUBSTANTIAL, NECESSARY AND CONSTITUTIONAL

A. The City's Interest In Requiring Insurance Passes The Pickering Balancing Test²¹

The City is *legislatively obligated*, pursuant to O.R.C. §723.01, to regulate and maintain its sidewalks and tree lawns [See, *Dickerhoof v. Canton*, 6 Ohio St. 3d 128 (1983)].

Coupled with the above-cited statute is the ruling in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26 (1982), which abrogated the doctrine of sovereign immunity. When one combines §723.01, with the holding in *Haverlack*, the City of Lakewood can clearly be held liable for negligence if it is determined that its sidewalks or public ways are somehow deemed unsafe.

21. While the City maintains that §901.181 is subject only to the *Pickering* balancing test, the City believes that its ordinal provisions can pass any reasonable analysis this Court chooses, as will be argued, *infra*.

One need not go to the extremes of a *Palsgraf* analysis to envision someone being injured by the erection of a newsbox on City property.²² Even if such a suit ultimately proved to be unfounded, the City's taxpayers would be forced to bear the cost of defending such a suit.

The potential dangers of placing newsboxes on City property were well documented at Trial. If the Company wishes to place its commercial machines on property that, by law, the City is responsible for, then it should be prepared to insure its newsboxes and the City and indemnify the City against lawsuits. That is merely a cost of doing business [See, *Gannett Satellite Inf. Net. v. Metro Transp. A.*, 745 F.2d 767, 774 (2nd Cir. 1984), wherein the Circuit Court held: "As a large commercial distributor, it should be ready to absorb increases in the cost of doing business"]].

The Company already has provided certificates of insurance to other cities covering its newsboxes in the amount of \$1,000,000.00 [10 times the amount required by §901.181(c)(5)]. It is absurd to allow the Company to place its commercial devices wherever it pleases on property which the City is legally responsible for, yet shirk its responsibility to properly insure, defend, and indemnify the City for damages caused by its devices. Let this cost be recovered in the price of newspapers, not in the tax bill of one who may not even choose to read the Company paper. As Appellee's newsboxes are fixed retailers, Appellee should bear this expense of doing business (and extend to the City the insurance it already has), just as any bookstore or theater must do.

Finally, it is basic Constitutional law that a governmental unit does not violate the First Amendment by re-

22. One Ohio city (Dayton) was sued under the provisions of O.R.C. §723.01 and *Haverlack*, for the erection of light poles located off the traveled portions of a highway [See, *Strunk v. Dayton Power & Light Co.*, 6 Ohio St. 3d 429 (1983)].

fusing to subsidize certain activities [*See, Cammarano v. United States*, 358 U.S. 498 (1959)]. To paraphrase *Regan v. Taxation with Representation*, 461 U.S. 540 (1983):

[In this case], as in *Cammarano*, [City Council] has not infringed any First Amendment rights or regulated any First Amendment activity. [City Council] has simply chosen not to pay for [the cost of the risks generated by Appellee's activities]. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state".

Id. at 546 (citations omitted). Thus, the City's insurance requirement passes the *Pickering* balancing test as the City's interest is substantial, and there is no infringement on the Company's First Amendment rights.

B. The Sixth Circuit Court's Decision Concerning The City's Condition Of Requiring Newsboxes To Be Insured Was Erroneous

The Circuit Court held that requiring newsboxes to be insured was unconstitutional because: (1) Erecting newsboxes on City property is a First Amendment right (citing *Lovell*); and, (2) Other objects on City property (e.g., bus shelters, utility poles, and public telephones) are not required to have insurance.

As discussed above, the First Amendment does not grant the Company the right to permanently occupy and erect structures on City property. Thus, newsboxes are not equal to *Alma Lovell*, and the Court was wrong in concluding that they were.

Moreover, there was no evidence presented at trial relating to the rental, or any other use of City property, and the provision (or non-provision) of insurance, whether pursuant to §901.18 or otherwise. Thus, there are no facts in the record to support the Court's conclusion.

As held by Judge Unthank in his concurring opinion, the insurance conditions do not violate the First Amendment because they are "legitimate and reasonable provisions for the protection of the City from liability" (*Jur. St.* A19). The Company's use of City property is different from the use made by other entities currently owning objects on City property: "The fact that the City does not require insurance from public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services." *Id.* at A19.

Equal protection necessarily relates to the judging of classifications by law. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same [*See, Tigner v. Texas*, 310 U.S. 141, 147 (1940)]. The mere fact that a law classifies does not void the law. In the exercise of its powers, a legislature has considerable discretion in recognizing the differences between and among persons and situations [*See, McGowan v. Maryland*, 366 U.S. 420 (1961); *Schilb v. Kuebel*, 404 U.S. 357 (1971); and, *Barrett v. Indiana*, 229 U.S. 26 (1913)].

All items currently located on City property provide essential public services or provide services directly related to the public health, safety and welfare. These items are owned by public utilities or political subdivisions of the State. There are no "alternative channels" whereby these services could be provided to the City's residents.

Newsboxes, however, are not similarly situated. They do not provide essential public services, are not directly related to the public health, safety or welfare, are not owned by public utilities or political subdivisions of the State and there are more than adequate alternative channels by which the Company can sell its paper. Therefore, the City need not treat newsboxes the same as it treats other items currently on City property.²³ For these rea-

23. As held in *Packard v. Banton*, 264 U.S. 140, when a private, commercial use is made of city streets, the city may require the private use to be insured.

sons, the Circuit Court's decision invalidating §901.181 (c)(5) should be overturned.²⁴

The City has a substantial interest in having itself indemnified and in having the Company's newsbox liability insurance extended to the City, and such a condition does not violate any First Amendment rights of the Company.

III. THE CITY'S INTEREST IN ESTHETICS IS SUBSTANTIAL AND THE ARCHITECTURAL REVIEW REQUIREMENT IS NECESSARY, GOVERNED BY SUFFICIENT STANDARDS AND CONSTITUTIONAL

A. The City's Interest In Esthetics Passes The Pickering Balancing Test

This Court, in *City Council v. Taxpayers for Vincent*, 466 U.S. 789, held that esthetic interests are substantial enough to uphold a *total ban* of temporary political signs. *Id.* at 817.

Newsboxes constitute visual blight in and of themselves. The esthetic hazards of newsboxes have been commented on nationwide: "Planners and public officials throughout the country are unanimous in damning news vending machines." Longhini, *Coping With High-Tech Headaches*, *supra*, at J.A. 395.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, seven Justices agreed that billboards were a visual evil and could be prohibited (See, *Taxpayers for Vincent*, 466 U.S. at 806-807). In *Vincent*, the Court upheld the City's ban of temporary political signs because the medium of expression itself created a "substantive evil":

24. As noted above, O.R.C. §723.121 specifically provides for cities requiring insurance from lessees. If the Circuit Court's decision is allowed to stand, O.R.C. §723.121 will, effectively, be invalidated.

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. . . . *Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.*

Id. at 810 (emphasis added). Just like billboards and political signs, newsboxes are substantive evils—visual blight—that can be totally prohibited, and this Court should hold that they can be totally prohibited.

The City, however, instead of totally prohibiting newsboxes has attempted to accommodate them by ameliorating their blighting influence through design review. The design of *all* structures erected or remodeled within the City must be approved by the Architectural Board of Review. As held in *Associated Press v. NLRB*, 301 U.S. 103 (1937):

The business of the Associated Press is not immune from regulation because it is an agency of the Press. *The publisher of a newspaper has no special immunity from the application of general laws.* He has no special privilege to invade the rights and liberties of others.

Id. at 132-133 (emphasis added) [See also, *Young v. American Mini Theatres*, 427 U.S. 50 (1976): "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Id.* at 62]. Thus, the Company's commercial structures are not "immune" from the generally applicable law that the design of all structures within the City are subject to architectural review.

Under the City's comprehensive program to rehabilitate many of its commercial districts, the design of bookstores, theaters and churches, with their attendant First

Amendment rights, are subject to approval by the Architectural Board of Review. Moreover, bookstores', theaters' and churches' signs, with their attendant First Amendment rights, are subject to design review by the Architectural Board of Review.

There is absolutely no reason why the Company's vending machines should not be subject to design review. It would be an anomalous situation wherein a bookstore, theater or church, together with their respective signs, had to meet certain requirements of the Board to upgrade the City's appearance, but ill-designed, visually-blighting newsboxes could be placed on the sidewalk in front of such structures. Clearly, the City's interest in esthetics is substantial, and this condition does not, in any way, infringe on any First Amendment right of the Company. Thus, the requirement of design review passes the *Pickering* balancing test.

B. The Sixth Circuit Court's Decision Concerning The City's Condition Of Requiring Newsboxes To Undergo Design Review Was Erroneous

The Circuit Court's decision incorrectly held that newsboxes were equal to Alma Lovell and that the Architectural Board of Review's discretion is standardless because it does not have formalized, written standards.

The Architectural Board of Review is bound to follow §1325.03 of the Lakewood Codified Ordinances. Section 1325.03 sets forth the standards for architectural review in the City. This section provides that the Board is to review the design of structures within the City in order to protect the value, appearance and use of property, to maintain the high character of community development, to protect the public health, safety and welfare and to protect the values of real estate within the City.

The Board has consciously decided not to propound formal, written standards for the design of all construction

within the City.²⁵ Instead, the Board relies on the judgment of its members, some of whom are architects, and looks to its Architectural Workbook for general principles to guide their decisions. The Architectural Workbook provides samples and illustrations (without propounding strict standards) of signage deemed appropriate for the City. As newsboxes are small billboards, or, perhaps more accurately, bulky placards, the guidelines for signage could easily be adapted to newsboxes.

The plaintiff in *Reid v. Architectural Board of Review*, 119 Ohio App. 67 (Cuyahoga County App. Ct., 1963), raised the same issue of alleged standardless architectural review concerning an ordinance almost identical to Lakewood's §1325.03. The Court in *Reid*, at 70, held that the standards and criteria contained in such an ordinance were reasonable and sufficient for the board to carry out its duties.

In addition to the restrictions placed on the Board by §1325.03, all decisions of the Board are subject to judicial review pursuant to O.R.C. §2506.01, *et seq.* Section 2506.04 provides that the Board's decisions cannot be arbitrary, capricious, unconstitutional and/or against the weight of the evidence. Clearly, the Board's discretion is not limitless, and the City has a substantial interest in reviewing the design of newsboxes. For the foregoing reasons, this Court should overturn the Circuit Court's decision invalidating §901.181(a).

IV. THE CITY'S INTEREST IN VESTING DISCRETION IN ITS MAYOR TO PROTECT THE PUBLIC HEALTH, SAFETY, WELFARE AND PROPERTY IS SUBSTANTIAL, GOVERNED BY SUFFICIENT STANDARDS, AND CONSTITUTIONAL

²⁵ It is questionable, both under state law and 42 U.S.C. §1983, whether prohibiting all construction within the City unless all proposed structures' designs met formalized, predetermined written standards would be constitutional.

A. The City's Interest In The Proper Location Of Newsboxes Passes the Pickering Balancing Test

The safety hazards posed by newsboxes were clearly demonstrated at trial. Also, §901.181 does not address, and was not expected to address, all safety hazards caused by erecting newsboxes on City property. Thus, some discretion is needed to meet situations not foreseen by §901.181.

The City, by law, cannot rent its property for private use unless the private use does not interfere with public use of the property. Public use of sidewalks and tree lawns includes: (1) Efficient movement of pedestrian traffic; (2) The provision of essential public services and services related to the public health, safety and welfare; and, (3) Personal expression of First Amendment rights. Thus, in addition to public health, safety and welfare hazards, the City must not allow the Company's (or any other private entity's) use of City property to interfere with public use of City property.

Rental of City property for newsboxes is a new use of City property. Simply stated, Lakewood City Council is not omniscient. It cannot foresee, nor legislatively provide for, all possible newsbox hazards at all possible newsbox locations.²⁶ All of the Company's proposed newsbox sites have different characteristics.

The Mayor's discretion is limited to determining whether a proposed newsbox site interferes with the public health, safety and welfare and/or public use of City

26. If the City were renting a part of City Hall, not needed for municipal purposes, to a bookstore, theater or church, the rental of such property would be authorized by Council, with the Mayor, or similar official, being responsible for drawing up the lease agreement. No one would expect the ordinance authorizing the lease (e.g., §901.181) to be a complete lease document, containing all the terms and conditions of the lease. The same reasoning applies to newsboxes.

property.²⁷ His decisions are subject to review by City Council. Council's decisions are then subject to judicial review pursuant to O.R.C. §2506.01, *et seq.* As such, this condition for granting a governmentally created property right does not violate any of the Company's alleged First Amendment rights and is valid under *Pickering*.

B. The Sixth Circuit Court's Decision Concerning The City's Condition Of Requiring Newsbox Rental Permits To Be Subject To The Limited Discretion Of The Mayor Was Erroneous

The Circuit Court incorrectly equated newsboxes with Alma Lovell and then erroneously held that the Mayor's discretion was "unbridled".

The Mayor may only deny a rental permit for health, safety or general welfare reasons, or if the private use of City property interferes with public use of the property. If he denies a permit, he must state the reasons for his denial. If he adds conditions, they must be "necessary" and "reasonable" for the same reasons.

Pursuant to §901.181(e), the Mayor's decision in denying, or revoking, a rental permit is subject to review by City Council. In turn, their decision is subject to judicial review pursuant to O.R.C. §2506.01, *et seq.*, as outlined above.²⁸ To paraphrase the holding in *CSC v. Letter Carriers*, 413 U.S. at 571, it is not this Court's task "... to

27. In *CSC v. Letter Carriers*, 413 U.S. 548, the Court upheld a restriction on Federal employees' participation in partisan politics based, at least in part, on the discretionary powers of the Civil Service Commission's Information Unit in judging whether the content of federal employees' speech violated the Hatch Act (*CSC v. Letter Carriers*, 413 U.S. at 579-580, n.22).

28. This discretionary power is in keeping with O.R.C. §723.121's provisions for renting municipal property. Section 723.121 provides that the plans and specifications of all structures, together with the use of the structures, be approved by the City to ensure that the private use does not interfere with public use of City property or endanger the public.

destroy the [Ordinance], but to construe it, if consistent with the will of [City Council], so as to comport with constitutional limitations."

As the Company has not applied for rental permits, the issue of the Mayor's discretion is not ripe for review. In *Greer v. Spock*, 424 U.S. 828 (1976), the base Commander was vested with the authority to prohibit leafletting, if, in his discretion, he found the leaflets to "constitute 'a clear danger to [military] loyalty, discipline, or morale,'" *Id.* at 840. In attacking the regulation, it was argued that such discretion as to the content of leaflets (a much greater discretion than the Mayor's) was unconstitutional. The Court held that the respondents (just like the Company in this case) had no constitutional right to engage in their activity (*Id.* 838). Since none of the respondents had submitted material for review, the issue of the Commander's discretion was not ripe for review. The Court upheld the facial constitutionality of the regulation and held that a possible irrational, invidious or arbitrary application of the regulation was insufficient to invalidate it. *Id.* at 840.

The Sixth Circuit attempted to distinguish *Greer* by limiting its holding to military facilities. The Court did so in the analytical context of newsboxes being equal to Alma Lovell. The City submits that the *Greer* standard of ripeness vis-a-vis discretion should be applied in cases where a private entity is seeking a property interest in public property. Thus, just as in *Greer*, at 840, there is nothing in the Constitution that disables a Mayor from acting to avert, on content neutral grounds, what he perceives to be a clear danger to the health, safety or general welfare of the City's residents or the residents' use of City property.

Finally, in *Gannett Satellite Inf. Net. v. Metro Transp. A.*, 745 F.2d 767 (2nd Cir. 1984), MTA had no regulations to guide its employees in granting licenses for newsboxes or in determining the terms of the licenses. Gannett challenged the regulation as being unconstitutionally vague. The Circuit Court held that, because there was no evidence that MTA had ever arbitrarily denied licenses or imposed unreasonably discriminatory terms, the case did not present a justiciable controversy with respect to the reasonableness of the licensing terms. *Id.* at 776.

The Sixth Circuit Court, in the instant case, held that no guidelines are constitutional, while limiting guidelines are not (*See*, Jur. St. A13-A14). The Court went on to hold that *Gannett* had not challenged the facial constitutionality of the MTA guidelines; *ergo*, the *Gannett* holding was inapposite to the instant case. *Id.* at A14. What the Court failed to "analyze" in its holding is the impossibility of facially challenging nonexistent guidelines. Thus, as there has been no application for rental permits, there is no justiciable issue as to the Mayor "irrationally, invidiously or arbitrarily" denying such an application.

For all of the following reasons, the Circuit Court's decision invalidating §901.181(c)(7) should be overturned.

V. ASSUMING ARGUENDO THAT THE COURT FINDS A FIRST AMENDMENT RIGHT FOR PERSONS TO PERMANENTLY OCCUPY CITY PROPERTY, THE PROVISIONS IN QUESTION DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION UNDER ANY APPLICABLE STANDARD

A. Section 901.181's Requirements Are Constitutional Because The City's Interests Substantially Outweigh Any Incidental Restrictions On The Company's Alleged First Amendment Rights

1. The Company's activity combines speech and conduct and the O'Brien balancing test applies

The Company's alleged First Amendment right to sell its newspapers via newsboxes clearly combines elements of "conduct" and "speech", just as leasing city property for cable television lines (*Los Angeles v. Preferred Communications*, 90 L. Ed. 2d at 487-488), posting temporary political signs (*Id.* at 488; and, *Taxpayers for Vincent*, 466 U.S. at 804-805), and, burning draft cards [*United States v. O'Brien*, 391 U.S. 367 (1968)] combine conduct and speech. Therefore, the *O'Brien* four-part analysis²⁹ is applied to judge the ordinal provisions: (1) Are they within the Constitutional powers of the City; (2) Are they unrelated to the suppression of ideas; (3) Do they further substantial governmental interests; and, (4) Is the incidental restriction on alleged First Amendment freedoms no greater than essential in furthering the governmental interests [See, *O'Brien*, 391 U.S. at 377; and, *Taxpayers for Vincent*, 466 U.S. at 804-805].

This case is in much the same posture as *Vincent*, in that:

In this case, [the Company] do[es] not dispute that it is within the constitutional power of the City to at-

29. The City is aware of this Court's ruling in *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) that the four-part *O'Brien* analysis "is little, if any, different from the standard applied to time, place, or manner restrictions" (*Id.* at 298). The City is also aware that in summarily affirming *Watseka v. Illinois Public Action Council*, _____ U.S. _____, 55 U.S.L.W. 3492 (January 20, 1987), this Court permitted a Circuit Court's decision to stand that added the requirement that time, place and manner restrictions be the least restrictive possible in judging regulations concerning door-to-door solicitors.

Summary actions of the Court do not have the same authority as plenary considerations, and this Court has "... not imposed the requirement that the restriction be the least restrictive means available. ..." *Id.* at 3493, J. White, dissenting. If, however, this Court means to add the requirement affirmed in *Watseka*, then there is a great difference between the *O'Brien* analysis and the analysis of time, place and manner restrictions.

tempt to improve its appearance [and protect the health, safety and welfare of its residents], or that th[ese] interest[s] [are] basically unrelated to the suppression of ideas.

Id. at 805. In such a posture:

... the critical inquiries are whether th[ese] interest[s] [are] sufficiently substantial to justify the effect of the ordinance on appellee[']s expression, and whether that effect is no greater than necessary to accomplish the City's purpose[s].

Id. at 805. Or, more simply stated in *Los Angeles v. Preferred Communications*, 90 L. Ed. 2d 480:

... where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests.

Id. at 90 L. Ed. 2d, pp. 487-488.

2. The City's interests substantially outweigh the incidental impact, if any, on the Company's right of expression

The only effect on the Company's ability to express itself is that newsboxes located on City property have to be insured [901.181(c)(5)], have to pass architectural review [§901.181(a)] and have to be located where they do not interfere with the public's health, safety and welfare or use of City property [§901.181(c)(7)]. Newsboxes are not prohibited on City property. However, even if each ordinal provision did prohibit newsboxes, such a prohibition would pass muster under *O'Brien*.

In *Vincent*, the incidental restriction on appellees' expression was that they could not post signs on public property, much as the Company cannot erect newsboxes on City property (without obtaining a rental permit). Appellees in *Vincent*, however, could post a sign on private property (*Vincent*, 466 U.S. at 811) and could personally

hand out their signs (*Id.* at 812). In the instant case, the Company may deliver its paper door-to-door, personally sell it on City streets, deliver it by mail, sell it in stores and sell it via newsboxes on non-City owned property in commercial districts of the City. Thus, any restriction on Appellee's "expression" is minimal, at most. To paraphrase Vincent:

The [Lakewood] ordinance does not affect any individual's freedom to exercise the right to speak and to distribute [newspapers] in the same place where the [erection of newsboxes] on [City] property is prohibited. To the extent that the [erection of newsboxes] on [City] property has advantages over these forms of expression, . . . there is no reason to believe that these same advantages cannot be obtained through other means.

Id. at 812.

Counterbalancing this minimal impact on expression are the City's interests in esthetics and the public health, safety and welfare. As held in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, these interests are "substantial".

As to 901.181(c)(5), it is the newsboxes themselves which cause the substantive evil—i.e., the risk of lawsuits being filed, and damages being found, against the City. Thus, assuming *arguendo* that the Company could not obtain the required insurance (which it already has in an amount 10 times greater than required), the City could prohibit newsboxes, for ". . . it is the tangible medium of expressing the message that has the adverse impact on the [cost of the City insuring its property]", and the provision "responds precisely to the substantive problem which legitimately concerns the City. The [provision] curtails no more speech than is necessary to accomplish its purpose." *Id.* at 810. Thus, the City's interest in protecting itself and its residents from the harm, and the risk of harm, created by newsboxes clearly outweighs any alleged incidental impact on the Company's right of expression.

The same rationale would allow the City to ban newsboxes for failing to pass architectural review (i.e., ". . . it is the tangible medium of expressing the message [newsboxes] that has the adverse impact on the appearance of the landscape") or for failing to pass the Mayor's discretion as to locating newsboxes (i.e., ". . . it is the tangible medium of expressing the message [newsboxes] that has the adverse impact on the [public health, safety and welfare or public use of City property]").

As the City's interests in esthetics and the public health, safety and welfare outweigh any incidental impact on the Company's right of expression and the provisions go no farther than necessary in order to accomplish their purposes, the ordinal provisions are constitutional under the *O'Brien* standard. Therefore, if applying the *O'Brien* standard, this Court should overturn the Circuit Court's decision invalidating §901.181(a), (c)(5) and (c)(7).

B. Section 901.181's Requirements Are Constitutional Time, Place And Manner Regulations

The standard for time, place and manner restrictions on speech is found in *Clark v. Community for Creative Nonviolence*, 468 U.S. 288:

We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve significant governmental interests, and that they leave open ample alternative channels of communication of the information.

Id. at 293 (citations omitted).³⁰

30. Even if this Court were to add the requirement that time, place and manner regulations must be the "least restrictive possible" (See, discussion, *supra* at 44, n.29), the ordinal provisions would be constitutional. City Planner Hartt testified that §901.181 was the least restrictive means possible to guard against the harms of newsboxes and should be more restrictive.

1. The requirements are content neutral and leave open ample alternative channels of communication

As noted above, the Company has never argued that the ordinal provisions are anything but content neutral. Equally clear is the fact that there are ample alternative channels for the Company to sell its newspaper.

2. The requirements are narrowly tailored to serve significant Governmental interests

The basic goals of the ordinal provisions are: (1) To further upgrade the appearance of the City; and, (2) To protect the public health, safety and general welfare and ensure that private use of City property does not interfere with public use of City property.

There is no doubt that a City may protect the " 'safety and convenience' of persons using a public forum . . ." [See, *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); and, *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 650 (1981)]. Additionally, this Court must take into consideration the City sidewalks' and public ways' special attributes ". . . since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-651.³¹ Thus, this Court must consider that public use of City property is primarily for: (1) Providing essential public services and services related to the public health, safety and welfare; (2) Efficient movement of vehicular and pedestrian traffic; and, (3) Personal expression of First Amendment rights.

31. The restriction in *Heffron* was much greater than the City's restriction in this case. In *Heffron*, respondents were allowed to rent booths at the Minnesota State Fair, but were denied the opportunity to peripatetically sell religious merchandise or solicit funds. In the case *sub judice*, Appellee may rent space from the City to sell its papers and may peripatetically sell and solicit sales.

Requiring newsboxes to be insured serves the significant governmental interest of protecting the City's residents from being taxed for damages and/or injuries and legal fees caused by the Company's newsboxes. The restriction is narrowly tailored to serve this interest, goes no further and ". . . curtails no more speech than is necessary to accomplish its purpose." *Taxpayers for Vincent*, 466 U.S. at 810. Similarly stated, ". . . the [City] would be more exposed to harm without the [insurance requirement] than with it, [and] the [requirement] is safe from invalidation under the First Amendment . . ." *Clark*, 468 U.S. at 297.

Similarly, requiring newsboxes to undergo design review by the Architectural Board of Review is valid. Instead of totally prohibiting newsboxes (which would be valid under *Vincent*), the City has attempted to accommodate newsboxes. In return, the City requires that the design of newsboxes be submitted for architectural review to reduce their blighting influence on the City. Again, the requirement goes no further than necessary to serve the City's interest and ". . . the [City] would be more exposed to harm without [design review] than with it, [and] the [requirement] is safe from invalidation under the First Amendment . . ." *Clark*, 408 U.S. at 297. It is, therefore, a valid time, place and manner regulation.

Finally, §901.181(c)(7)'s requirement that newsboxes be subject to the limited discretion of the Mayor is a valid time, place and manner regulation. The Mayor can only refuse an application for a rental permit based upon reasons of health, safety or welfare or interference with public use of City property. Because all conditions at all potential sites cannot be anticipated, the City would be more exposed to harm without the Mayor's discretion as to newsbox location than with such discretion. The requirement is narrowly tailored to serve the City's interest in protecting the use of its property and goes no farther than necessary, and curtails no more speech than

necessary, to accomplish its purpose, and it is a valid time, place and manner provision.

For all of the foregoing reasons, this Court should uphold the ordinal provisions at issue as valid time, place and manner restrictions.

CONCLUSION

For all of the reasons set forth above, the City requests the Court to hold that: (1) No person has a constitutional right to erect any structure on City property for any purpose, including selling newspapers; (2) The three ordinal provisions overturned by the Sixth Circuit Court of Appeals are valid and constitutional regulations of City property being rented for newsboxes; (3) Because of the nature, value, abuse and dangers of newsboxes, newsboxes may be totally prohibited from being erected and affixed on City property; and, (4) The City be awarded the costs of the within action.

Respectfully submitted,

HENRY B. FISCHER, *Counsel of Record*

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER

& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

(216) 781-1212

WILLIAM E. BLACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

City of Lakewood

12650 Detroit Avenue

Lakewood, Ohio 44107

(216) 521-6580

Attorneys for Appellant

City of Lakewood

ADDENDUM

CONSTITUTION OF OHIO

Article XVIII,

§ 3 [Powers.]

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

OHIO REVISED CODE

723.121 Conveyances, grants or permits to use land not needed for street or highway purposes

The legislative authority of any municipal corporation may convey the fee simple estate or any lesser estate or interest in, or permit the use of, for such period as it shall determine, any lands owned by such municipal corporation and acquired or used for public highways, streets, avenues, sidewalks, public grounds, bridges, aqueducts, and viaducts, or in connection with any such purposes or as incidental to the acquisition of land for any of such purposes, provided that it shall determine, and enter its determination in the minutes of its proceedings, that the property or interest so to be conveyed or be permitted to be used is not needed by the municipal corporation for any of such purposes. Such conveyance or permit to use may be to the grantee or permittee or to the grantee or permittee and his or its successors and assigns and shall be of such portion of such lands as such legislative authority determines, which shall be described in the deed or other

instrument of conveyance and in any permit to use, and may include or be limited to areas or space on, above, or below the surface, and may include the grant of easements or other interests in any such lands not so conveyed or made subject to a permit to use, for use by the grantee for buildings or structures or other uses and purposes, and for the support of buildings or structures constructed or to be constructed in or on the lands, areas, or space conveyed or made subject to a permit to use.

Whenever pursuant to this section separate units of property are created in any lands, each unit shall for all purposes constitute real property and shall be deemed real estate within the meaning of all provisions of the Revised Code and shall be deemed to be a separate parcel for all purposes of taxation and assessment of real property and no other unit or other part of such lands shall be charged with the payment of such taxes and assessments.

With respect to any of such property not owned in fee simple by the municipal corporation, the legislative authority thereof may grant the right to use any portion thereof in perpetuity or for such period of time as it shall specify, including areas or space on, above, or beneath the surface, together with rights for the support of buildings or structures constructed or to be constructed thereon or therein, provided that it shall determine, and enter its determination on the minutes of its proceedings, that the property made subject to a permit to use is not needed by the municipal corporation for any of such purposes.

The legislative authority of such municipal corporation shall require, as either a condition precedent or a condition subsequent to any conveyance or grant or permit to use, that the plans and specifications for all such buildings or structures and the contemplated use thereof, be approved by the municipal corporation as not interfering with its use for its purposes of any such property and not

unduly endangering the public, and may require such indemnity agreements in favor of the municipal corporation and the public as are lawful and as shall be deemed necessary by it. The municipal corporation shall not unreasonably withhold approval of such plans, specifications, and contemplated use.

All such conveyances or grants or permits to use shall be made with competitive bidding as required by section 721.03 of the Revised Code, except that competitive bidding shall not be required if such conveyance, grant, or permit to use is to be made to the United States of America or this state, or any political subdivision, taxing district, department, commission, board, institution, authority, or other agency of either.

In any case where any municipal corporation has acquired or acquires easements in or permits to use areas or space on, above, or below the surface for any purpose, the legislative authority thereof is authorized to extinguish them in whole or in part or subordinate them to uses by others, provided that it shall determine, and enter its determination on the minutes of its proceedings, that the easements or permits to use so extinguished or subordinated are not needed for municipal purposes.

No conveyance, easement, lease, permit, or other instrument executed pursuant to the authorization given by this section shall prejudice any right, title, or interest in any lands affected thereby which at the date thereof existed in any person, firm, or corporation, other than the municipal corporation which makes such conveyance, grants such right, or executes such instrument and other than members of the general public having no specific rights in said lands, unless such right, title, or interest was expressly subject to the right of the municipal corporation to make such conveyance, grant such right, or execute such instrument and unless said municipal corpora-

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tion by such instrument expressly exercises such right, nor shall any public utility be required to move or relocate any of its facilities that may be located in or on the areas described in any such conveyance, easement, lease, permit, or other instrument.

APPELLEE'S

BRIEF

No. 86-1042

Supreme Court, U.S.
FILED

JUL 17 1987

JOSEPH F. SPANIEL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPELLEE'S BRIEF ON THE MERITS

JAMES P. GARNER, *Counsel of Record*

KAREN B. NEWBORN

DAVID L. MARBURGER

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

BRUCE W. SANFORD

BAKER & HOSTETLER

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 861-1500

PETER C. GOULD

BARRY N. STEINER

SABIN, BERMANT & BLAU

350 Madison Avenue

New York, New York 10017

(212) 953-0400

Attorneys for Appellee Plain

Dealer Publishing Company

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QUESTIONS PRESENTED

1. Whether the Court of Appeals ruled correctly that two provisions of a municipal ordinance violate the First Amendment because they fail to provide reasonably narrow, definite, and objective standards for determining whether to grant a license to distribute newspapers to the public by means of newsracks, effectively vesting unlimited discretion in city officials to grant or deny said licenses.
2. Whether the Court of Appeals ruled correctly that a provision of a municipal ordinance regulating newsracks is unconstitutional where it unjustifiably singles out newspapers to insure and indemnify the municipality for personal injury liability.

LIST OF PARTIES

The Appellant is the City of Lakewood. The Appellee is the Plain Dealer Publishing Company. Appellee has no publicly owned affiliates or publicly owned subsidiaries.

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No. 86-1042

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPELLEE'S BRIEF ON THE MERITS

**CONSTITUTIONAL PROVISIONS AND
CITY ORDINANCES**

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Fourteenth Amendment, United States Constitution:

No State shall . . . deprive any person of . . . liberty . . . without due process of law; . . .

Section 901.181, Lakewood Codified Ordinances:

901.181 NEWSPAPER DISPENSING DEVICES; PERMIT AND APPLICATION.

Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.

The Mayor shall either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

- (a) The term "newspaper dispensing device", as used in this Section shall mean a mechanical coin operated container constructed of metal or other material of substantially equivalent strength and durability, not more than fifty (50) inches in height and not more than twenty-five (25) inches in length and width. The design of such devices shall be subject to approval by the Architectural Board of Review.
- (b) [N]o newspaper dispensing device shall be placed, installed, used or maintained:
 - (1) so as to reduce the clear, continuous combined sidewalk and paved tree lawn width to less than five (5) feet;
 - (2) within five (5) feet of any fire hydrant or other emergency facility;
 - (3) within five (5) feet of any intersecting driveway, alley, or street;
 - (4) within three (3) feet of any marked crosswalk;

- (5) at any location where the width of paved clear space in any direction for the passageway of pedestrians is reduced to less than five (5) feet;
 - (6) within two hundred and fifty (250) feet of another newspaper dispensing device containing the same newspaper or news periodical, except that the Mayor may permit two such dispensing devices at any intersection where such placement would not impair traffic or otherwise create a hazardous condition; and
 - (7) at any location where three (3) newspaper dispensing devices are already located.
- (c) The rental permit shall be granted upon the following conditions:
- (5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall

be provided to the City and maintained before and during the installation of such devices;

.....

- (7) such other terms and conditions deemed necessary and reasonable by the Mayor.

901.18 ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND

.....

(b) No person, firm, or corporation shall exclusively use property of the City of Lakewood held for use by the general public except pursuant to rental agreement or permits including provision for the payment of a reasonable rental as may be authorized by ordinance. The term "exclusive use", as used in this Section shall mean continuous use of property in the manner hereinabove stated to the exclusion or limitation of the general public for a period of thirty (30) minutes or longer. Applications for rental agreements or permits for the exclusive use of public property of the City of Lakewood shall be made to the City Council, except as otherwise permitted by ordinance.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit holding unconstitutional a municipal ordinance that vests unbridled discretion in city officials to grant or deny permits for the placement of newsracks on public ways.

I. The Complaint.

In early 1982, Appellee Plain Dealer Publishing Company ("the Plain Dealer") notified Appellant City of Lakewood that the Plain Dealer wished to distribute its daily newspaper to the public through newspaper dispensing

machines ("newsracks") placed at appropriate locations on public rights of way within the city limits. Citing numerous cases ruling that municipal newsrack regulations are subject to constitutional constraints, the Plain Dealer sought the City's cooperation in allowing the placement of single newsracks at sixteen locations along three major public thoroughfares. (Joint Appendix "J.A." 44, 67-68.)

The City denied the Plain Dealer's request, stating that "a meeting with Plain Dealer officials would serve no useful purpose." (J.A. 10.) The City relied on Section 901.18 of its Codified Ordinances, which provided:

No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley or public ground within the City.

(Jurisdictional Statement "Jur. St." 4 n.2.) The City permitted (and still permits) telephone booths, mail boxes, utility appliances, and bus shelters to remain on its public ways, but asserted that Section 901.18 prohibited the placement of newsracks there.

Because Lakewood had foreclosed further negotiations, the Plain Dealer filed this action in the United States District Court for the Northern District of Ohio. The Complaint sought a declaration that Section 901.18 violated the First and Fourteenth Amendments to the United States Constitution. The Complaint also sought injunctive relief. (J.A. 4.)

On August 18, 1983, the Court issued a declaratory judgment that Section 901.18 was unconstitutional. The Court postponed issuance of a permanent injunction for sixty days, giving the City the option to enact a reason-

able, less restrictive ordinance that would not interfere with the Plain Dealer's First Amendment rights. (J.A. 17, 18.)

II. The Amended Complaint.

Rather than preserving through appeal the issue of whether it could prohibit newsracks on its public ways, the City chose to enact new regulations.¹ On October 18, 1983, it amended Section 901.18 to provide that no person may "exclusively use" City property except through rental agreements. The amendment defines an "exclusive use" as the "continuous use of property . . . to the exclusion or limitation of the general public for a period of thirty (30) minutes or longer." (J.A. 266.)

The City also enacted Section 901.181, which applies specifically to newsracks ("the Ordinance"). The Ordinance removes the City's total ban of newsracks. It prohibits the placement of newsracks on most public thoroughfares, but authorizes City officials to exercise their discretion to permit them on two of the thoroughfares where the Plain Dealer sought to place newsracks. (J.A. 280-284.)

The Ordinance also provides that the Mayor may devise any terms "deemed" by him to be "necessary and reasonable" as a condition for newsrack placement along the public ways. The Plain Dealer amended its complaint to challenge the constitutionality of that provision and others.

III. The District Court And Court Of Appeals Rulings.

The case was tried on April 11 and 12, 1984. On July 12, 1984, the Court ruled in favor of the City. The

1. The District Court's order was a final, appealable order. *E.g., United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981).

Court's Memorandum and Order adopted virtually verbatim the City's proposed findings of fact and conclusions of law. (*Compare* J.A. 213-217 with J.A. 191-211.)

The Plain Dealer appealed to the United States Court of Appeals for the Sixth Circuit. On July 10, 1986, the Court of Appeals affirmed in part and reversed in part. The Court upheld as constitutional the City's prohibition of newsracks on Clifton Boulevard, one of the three major thoroughfares where the Plain Dealer sought to place newsracks. The Court ruled that three provisions of the Ordinance violated the First and Fourteenth Amendments. Those rulings are:

1. The City's ordinance unconstitutionally gave the Mayor unfettered discretion to deny newsrack permits.
2. The City's ordinance unconstitutionally gave the City's Architectural Board of Review unfettered discretion to disapprove the designs of newsracks.
3. The City's ordinance unconstitutionally singled out newsrack owners (newspaper publishers and distributors) to indemnify and insure the City for liability "occasioned" by the use and placement of newsracks.

794 F.2d 1139, 1143-1147. The City appealed the Court of Appeals' rulings to this Court pursuant to 28 U.S.C. § 1254(2).

STATEMENT OF FACTS

I. The Parties.

The Plain Dealer publishes a major metropolitan daily newspaper called *The Plain Dealer*, which has the

largest circulation of any newspaper in Ohio. *The Plain Dealer* is published in Cleveland, Ohio and its primary circulation area includes the City of Lakewood.

The City of Lakewood encompasses an urban industrial, commercial, and older residential area sharing part of the northwestern border of the City of Cleveland. (J.A. 371.) Several of Cleveland's main western thoroughfares continue through Lakewood. (See J.A. 165, 166.)

About 60,000 people live within Lakewood's 5½ square miles, and thousands more travel through Lakewood each day on their way to and from downtown Cleveland. Stores, offices, and other commercial establishments line Detroit and Madison avenues, two of Lakewood's main thoroughfares. Older homes and apartment buildings share other thoroughfares with municipal buildings, school buildings and even some small motels. (J.A. 69-72, 232-243, 256-264.)

II. The Function Of Newsracks.

The Plain Dealer circulates its newspaper through home delivery, privately owned stores, the mail, and newsracks placed along public ways. (J.A. 59, 61.)

The Plain Dealer uses newsracks to sell individual copies of *The Plain Dealer* to passersby and bus commuters along public ways. Early each morning, the Plain Dealer's newspaper delivery drivers go to the locations where newsracks have been placed and fill them with that day's issue of *The Plain Dealer*. In some areas, the public demand for the newspaper is so high that the Plain Dealer fills its racks more than once a day. (J.A. 84.) Each weekday, more than 21,000 people obtain a

new issue of *The Plain Dealer* from newsracks. Each week, about 5,500 people obtain the Sunday issue of the newspaper through newsracks. (J.A. 61, 74.)

Newsracks offer newspapers to those who may not regularly receive the paper at home. They reach individuals who do not ordinarily seek out newspapers, but who decide to read a particular issue upon seeing the day's top news or sports headline through the newsrack window. In the same way, they interest the visitor from out of town in reading the local paper. For those seeking more information about a story carried on radio or television, newsracks provide easy access to the newspaper's more detailed coverage. They also make the paper readily available to those who buy it only "on certain days or [for] certain sections." (J.A. 61.)

Newsracks are a convenience to the elderly, the infirm and others who cannot arrange or afford to have the paper delivered every day. They are also convenient to those who are waiting for commuter buses. As the Plain Dealer Circulation Director testified:

[P]eople generally buy a newspaper if it is close at hand. They are waiting for a bus, they are not going to take a chance of missing the bus by walking a couple of blocks to buy the paper and come back. (J.A. 72; see J.A. 61, 62.)

III. Newsracks Are Not Permanent, Immobile Fixtures.

Notwithstanding the City's mischaracterization, the Plain Dealer does not "erect" newsracks "wherever it pleases." (City Brief 33, 34.) As in this case, the Plain Dealer has attempted to work with municipalities in placing newsracks along public ways where pedestrian

traffic is high and where newsracks are compatible with other uses of the streets.²

To secure its newsracks, the Plain Dealer usually places a weight inside or cables them to a stationary object, neither of which permanently affixes them to the sidewalk.³ As the Plain Dealer's newsracks are only four feet tall, less than 1½ feet square and weigh about 100 pounds, they can be moved easily for sidewalk repair or any other reason. (See J.A. 92.) As one court described newsracks:

[T]hey are easily moved and in a way are functionally safer than a newsboy. . . . They are essentially semi-stationary newsboys.

. . . .

[Newsboxes] are not permanent nor are they absolutely stationary. Their location can be changed simply by turning a key in a lock.

Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648, 654, 659 (Sup. Ct. 1972). As that court recognized, newsracks are the mechanical cousins of hawkers who distribute newspapers while standing on street corners. Unlike hawkers, however, newsracks are silent and immune to extreme weather, hunger, fatigue, and illness.

IV. The Proposed Placement Of Newsracks In Lakewood.

The Ordinance provides for newsrack placement along the east-west thoroughfares of Detroit and Madison ave-

2. The City also mischaracterizes the Plain Dealer as forcing its newsracks upon private property owners. (City Brief n.3.) Newsracks on private property are there with the owners' consent. (J.A. 82.)

3. The City's expert David Hartt testified that newsracks should be anchored on flat concrete pads. (J.A. 156.) The Plain Dealer does not object to that recommendation or any reasonable regulation governing anchoring.

nues, portions of streets which intersect those avenues, and portions of fewer than half a dozen other streets. (See streets within areas marked in red on map, J.A. 371.) The Ordinance prohibits newsracks elsewhere on public property.

The Plain Dealer seeks to place newsracks along Detroit and Madison avenues, which span the City's commercial district.⁴ (J.A. 67-68.) The average width of the sidewalks along Detroit and Madison is ten to fourteen feet. (J.A. 118.) After studying the matter, Lakewood's City Engineer has determined that newsracks can be placed at all of the sites proposed by the Plain Dealer. (J.A. 117.) The Captain of Lakewood's Police Department concurs in that view, testifying that he foresees no difficulty with placing newsracks on Detroit and Madison. (J.A. 126.)

SUMMARY OF ARGUMENT

This appeal presents the Court with a request from a municipality to uphold an Ordinance that vests City officials with unfettered discretion to decide which newspapers may be circulated from newsracks and which may not. This Court should reject that request because the Ordinance presents an unconstitutional threat of censorship. The Ordinance also requires the press to indemnify and insure the City, an unjustified burden imposed on no other user of City streets. This Court's long line of

4. The Plain Dealer has placed no newsracks in Lakewood because it objects to the City's discretionary licensing scheme. As previously mentioned, the Plain Dealer has also sought access to Clifton Boulevard, a six lane, federal and state roadway parallel to Detroit and Madison. (J.A. 44, 65-67 see photos at 256-264.) The Court of Appeals (we submit erroneously) upheld Lakewood's prohibition of newsracks on Clifton. 749 F.2d at 1147.

precedents invalidating governmental authority to engage in censorship and discrimination against the press provides the proper analytical framework upon which to decide this case. Thus, there is no need to engage in any of the legal tests urged by the City. The property rights analysis of *Pickering v. Board of Education*,⁵ the speech/conduct analysis of *United States v. O'Brien*,⁶ and even traditional time, place, and manner analysis are all irrelevant to the issues presented by this appeal.

Most of the City's brief is devoted to arguing that newsracks are not beyond the reach of municipal regulation. But the Court of Appeals did not rule, and the Plain Dealer has never argued, that newsracks are exempt from all municipal regulation. The Plain Dealer has never disputed the City's right to regulate newsracks, subject to constitutional limitations. This appeal concerns the method Lakewood has chosen to regulate newsracks, not whether Lakewood can regulate newsracks at all.

Seeking to portray the Plain Dealer as a mere vendor of commercial merchandise, the City ignores this Court's pronouncements that a free press is "essential to the . . . vitality of society as a whole." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-504 (1984). As Justice Frankfurter stated:

[The newspaper business] has a relation to the public interest unlike that of any other enterprise pursued for profit. . . . The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes.

5. 391 U.S. 563 (1968).

6. 391 U.S. 367 (1968).

Associated Press v. United States, 326 U.S. 1, 28 (1945) (concurring); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973) (that newspapers are sold for profit is immaterial under the First Amendment). Lakewood's failure to acknowledge the special constitutional role of the press in providing information indispensable to the public welfare taints its entire argument.

The City seeks a holding that it constitutionally can ban the placement of newsracks on all public ways, an issue that it abandoned during the course of this litigation by failing to appeal the District Court's initial order. Whether the City can absolutely prohibit newsracks, an important method of circulating newspapers directly to the public, is not before this Court. If this appeal actually presented that issue, this Court's precedents would compel the conclusion that an absolute ban of newsracks on all Lakewood thoroughfares would violate the First Amendment.

In challenging the rulings below, Lakewood has placed itself in the position of attempting to defeat not only the holding of the Sixth Circuit Court of Appeals, but also the holdings of every other federal and state court that has considered constitutional challenges of newsrack ordinances.⁷ The unanimous view of those courts is impressive testimony that the Sixth Circuit has correctly interpreted this Court's precedents.

7. *Jacobsen v. United States Postal Service*, 812 F.2d 1151 (9th Cir. 1987); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984); *Gannett Satellite Information Network v. Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984); *Providence Journal Co. v. City of Newport, C.A. 86-0320-P* (D.R.I. June 12, 1987) (reproduced in addendum to this brief); *Southern Conn. Newspapers v. City of Greenwich*, 11 Media L. Rep. (BNA) 1051 (D. Conn. 1984); *Gannett Sat-*

(Continued on following page)

ARGUMENT

I. THE COURT OF APPEALS RULED CORRECTLY THAT THE CITY MAY NOT VEST ITS OFFICIALS WITH UNBRIDLED DISCRETION TO DENY NEWSRACK PERMITS.

A. Laws Which Vest Public Officials With Unguided Discretion To License A Means Of Distributing Information To The Public Violate The First Amendment.

The Court of Appeals ruled that the Ordinance violates the First Amendment because it vests the Mayor and the Architectural Board of Review ("the Board")

Footnote continued—

ellite Information Network v. Norwood, 579 F. Supp. 108 (D. Mass. 1984); *Gannett Satellite Information Network, Inc. v. City of Malden*, 9 Media L. Rep. (BNA) 2556 (D. Mass. Aug. 26, 1983); *Southern New Jersey Newspapers, Inc. v. State of New Jersey Dept. of Transp.*, 542 F. Supp. 173 (D. N.J. 1982); *Miller Newspapers v. City of Keene*, 546 F. Supp. 831 (D. N.H. 1982); *Redd v. City of Davison*, 7 Media L. Rep. (BNA) 1142 (E.D. Mich. March 25, 1981); *Westchester Rockland Newspapers, Inc. v. Village of Briarcliff Manor*, 5 Media L. Rep. (BNA) 1696 (S.D.N.Y. Aug. 10, 1979); *Westchester Rockland Newspapers, Inc. v. City of Yonkers*, 5 Media L. Rep. (BNA) 1777 (S.D.N.Y. Aug. 10, 1979); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F. Supp. 228 (E.D. Pa. 1974); *City of New York v. American School Publications, Inc.*, 69 N.Y.2d 576, 14 Media L. Rep. (BNA) 1153 (N.Y. 1987); *Kash Enterprises, Inc. v. City of Los Angeles*, 138 Cal. Rptr. 53 (Cal. 1977); *News Printing Co. v. Borough of Totowa*, 511 A.2d 139 (N.J. Super. 1986); *Passaic Daily News v. City of Clifton*, 491 A.2d 808 (N.J. Super. 1985); *Gluck v. County of Los Angeles*, 155 Cal. Rptr. 435 (Cal. App. 1979); *Remer v. City of El Cajon*, 125 Cal. Rptr. 116 (Cal. App. 1975); *California Newspaper Publishers Ass'n v. City of Burbank*, 123 Cal. Rptr. 880 (Cal. App. 1975); *Minnesota Newspaper Ass'n v. City of Minneapolis*, 9 Media L. Rep. (BNA) 2116 (Minn. Dist. Ct. August 3, 1983); *Gannett Co.*, 330 N.Y.S.2d 648; *contra Socialist Labor Party v. City of Glendale*, 4 Media L. Rep. (BNA) 1700 (Cal. App. July 12, 1978), withdrawn from publication by order of California Supreme Court, 147 Cal. Rptr. 422.

with unfettered discretion to grant or deny newsrack permits. This Court should affirm.

The First Amendment protects the press as a "vital source of public information," and as "an important restraint on government." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); accord *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259-260 (1974) (White, J., concurring) (the press plays an important and special role in the discussion of public affairs).

This Court has recognized that press reports about public affairs sometimes include "unpleasantly sharp attacks on government and public officials," and that the natural response by some officials is to use the law to retaliate against the press. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Consequently, the First Amendment has abolished the power of the government to censor the press "so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

The First Amendment's concern with censorship extends to government curtailments of circulation as well as interference with the content of a publication. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). As stated in *Lovell v. Griffin*:

Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed without the circulation, the publication would be of little value.

303 U.S. 444, 452 (1938). Accordingly, the First Amendment prohibits "authoritative selection" by public offi-

cial of literature or information to be circulated to the public. See *New York Times Co.*, 376 U.S. at 270; *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987) (First Amendment prohibits discrimination among members of the press).

An enactment creating the authority to engage in censorship also violates the First Amendment. Acting upon that principle, this Court has voided laws which vested municipal officials with unguided discretion to license the distribution of literature or information. Even though that authority extended only to distribution by a particular means and affected only distribution within the confines of public property, this Court has invalidated that authority because of its potential for censorship:

[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.

Cox v. Louisiana, 379 U.S. 536, 557 (1965) (parade on public streets); accord *Sect'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 964 n.12 (1984) (solicitation); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (door-to-door canvassing); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-153 (1969) (parade on public streets); *Staub v. City of Baxley*, 355 U.S. 313, 321-325 (1958) (solicitation on private property); *Niemotko v. Maryland*, 340 U.S. 268, 271-272 (1951) (meeting in public park); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (speech on public sidewalk); *Saia v. New York*, 334 U.S. 558, 560-561 (1948) (use of loud-speaker in public park); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (selling books within residential district).

Lakewood's ordinance presents that same threat of censorship.

B. The City's Ordinance Violates The First Amendment.

1. The Ordinance vests City officials with unlimited licensing discretion.

The Ordinance violates the First Amendment on its face. The Ordinance requires newspaper publishers to obtain a permit before using a newsrack to distribute newspapers on public ways. It authorizes the Mayor to deny permits, but sets forth no considerations that would justify denial. The Ordinance expressly provides:

The Mayor shall either deny the [permit] application, stating the reasons for such denial or grant said permit subject to the following terms. . . .

(J.A. 280.) The Court of Appeals construed this provision as limiting the conditions under which the Mayor may grant a permit, but containing no standards for denial of a permit. 794 F.2d at 1144.

In addition, the Ordinance allows the Mayor to set any conditions for granting a permit that are "deemed" by him to be "reasonable" and "necessary," but sets forth no standards to guide the Mayor in making those determinations. Section (c) (7) of the Ordinance expressly provides:

The rental permit shall be granted upon. . .

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.

(J.A. 282.)

By allowing the Mayor to deny a permit for any reason, and to devise any conditions deemed "reasonable" and

"necessary" for granting a permit, the Ordinance provides the Mayor with boundless authority. It contains no objective, ascertainable standards to control the Mayor's discretion. Like the airport resolution invalidated in *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 55 U.S.L.W. 4855 (U.S. June 15, 1987), the Ordinance gives the Mayor "the power to decide in the first instance" whether a particular reason for granting or denying a permit is appropriate. He is constrained solely by his own judgment.⁸

As the Court of Appeals ruled, the Ordinance effectively authorizes the Mayor to engage in censorship and content discrimination. The Mayor has absolute discretion to decide which publishers may enjoy the advantages of distributing their newspapers from newsracks and which may not. The Ordinance provides the Mayor with a potent instrument for punishing press critics while rewarding press supporters. Pursuant to his authority, the Mayor may "deem" it "reasonable" and "necessary" to exclude newspapers that are endorsing his political opponents, exposing wrongdoing in his administration, or simply advancing views that he thinks are unorthodox.⁹

For similar reasons, this Court struck down a virtually identical ordinance provision in *Largent*, 318 U.S. 418.

8. In *Bd. of Airport Comm'rs*, the petitioners claimed the authority to prohibit within Los Angeles Airport all speech activities that were not "airport-related." This Court invalidated that alleged authority because it gave airport officials the discretion to decide which activities were "airport-related" and which were not. The Court ruled that the potential for abuse of that discretion is "self-evident." 55 U.S.L.W. at 4857.

9. The City argues that Section (c) of the Ordinance is not constitutionally defective because it requires the Mayor to grant a permit when all of the conditions set forth in that section are satisfied. That argument is mere sophistry because Section (c) gives the Mayor unfettered discretion to create any conditions that he deems "reasonable" and "necessary."

That provision authorized a Mayor to grant or deny permits to sell books in certain districts according to whether he deemed it "proper or advisable." See *Sect'y of State of Maryland*, 467 U.S. at 964 n.12 (invalidating discretion to grant "whenever necessary" a waiver of solicitation restrictions).

As for the Architectural Board, the Ordinance contains no standard beyond the requirement that newspaper publishers obtain the Board's prior "approval" of their newsracks. (J.A. 280.) The Ordinance contains no ascertainable standards to control the Board's considerations in deciding whether to approve a newsrack. It contains the same potential for censorship and retaliation against criticism that is created by the Ordinance's grant of authority to the Mayor.¹⁰

2. The City's attempt to add limiting language through judicial construction cannot save its Ordinance.

The City argues that Section (b) of the Ordinance demonstrates Council's intent to limit the Mayor's considerations to health and safety factors. (City Brief 13 n.10; see J.A. 280-281 for text of Section (b).) Section (b) contains no language that purports to limit the broad licensing authority granted by Section (c) (7), which allows the Mayor to devise any "other" conditions for granting permits that he thinks are appropriate. (See pp. 17-18, *supra*.)

10. Although a newsrack may comply fully with all of the place and manner restrictions specified in the Ordinance, it will nevertheless violate the Ordinance unless the permission of City officials has been secured in advance. For that reason, the Ordinance constitutes a prior restraint of constitutionally protected expression. This Court, however, need not reach that issue because, as the Court of Appeals ruled, "[t]he constitutional problem here lies in the very existence of . . . unfettered discretion." 794 F.2d at 1144.

Nor does Section (b) contain any language purporting to limit the Mayor's broad discretion to deny a permit as authorized by the Ordinance's introductory section. (See p. 17, *supra*.) Thus, on its face, Section (b) has no effect on the unfettered licensing authority created by the Ordinance.¹¹

The City has revised its Ordinance several times, but never included the limiting language that it now seeks to add through judicial construction. Moreover, even if the Ordinance did contain the alleged "health and safety" standard, this Court has already ruled that a nearly identical standard is constitutionally insufficient. *Shuttlesworth*, 394 U.S. at 149-150 (ordinance authorized denial of a parade permit whenever city officials believed that "the public welfare, peace, safety, health, . . . or convenience" required that the permit be refused).

The City urges that the Mayor needs open-ended discretion because "it is not possible to foresee all hazards of each potential newsbox site within the 5.5 square miles of the City."¹² (City Brief 13.) Neither the City's failure to draft its regulations carefully nor the need for legislative adjustment based upon experience can justify violating basic constitutional principles. See *Bd. of Airport Comm'rs*, 55 U.S.L.W. 4855. In January, 1987, the City passed a

11. The City also claims that it offered evidence of the alleged health and safety limitation at trial. (City Brief 14.) That "evidence" was the Mayor's proffered testimony that he interprets the ordinance as limiting his discretion. (J.A. 177.) The District Court correctly disallowed that proffered testimony. Lakewood's Council speaks solely through its ordinances, not through the Mayor. See, e.g., *Friedman v. United States*, 364 F. Supp. 484, 488 (S.D. Ga. 1973); *National School of Aeronautics, Inc. v. U.S.*, 142 F. Supp. 933, 938 (U.S. Ct. Clms. 1956).

12. The City misreads its own Ordinance. The Ordinance does not allow newsracks in all "5.5 square miles of the City," but prohibits them in all but a few discrete areas.

new newsrack ordinance that adds new restrictions, e.g., prohibiting newsracks at handicap ramps. The 1987 ordinance demonstrates the ease with which the City can cure through amendment any drafting oversight it perceives, while avoiding the censorial threat which broad official discretion presents. (The 1987 ordinance is reproduced in the addendum.)

The City also seeks the aid of judicial construction to save its grant of broad authority to the Architectural Board, claiming that Section 1325.03 of Lakewood's ordinances limits the Board's discretion. It does not. (City Brief 12; see J.A. 385-386 for text of Section 1325.03.) That section merely states that the Board's purpose is to regulate "buildings" according to architectural principles. As the Court of Appeals ruled, newsracks are not "buildings." Moreover, the Board Chairman admitted at trial that the Board in fact has no standards governing newsracks. (J.A. 111, 114.)

3. The ability to appeal City officials' licensing decisions cannot save the Ordinance.

The City argues that the availability of judicial review of the Mayor's and the Board's decisions cures the Ordinance's constitutional defects. (City Brief 14, 17, 41.) However, as this Court has previously ruled, "judicial review to rectify abuses in the licensing system" cannot save an otherwise unconstitutional grant of standardless licensing authority. *Saia*, 334 U.S. at 560; accord *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

The fact that the Mayor must state his reasons for denial also does not save the Ordinance. That requirement does not limit the criteria which the Mayor may consider in subsequent decisions. Indeed, only through a series of

adjudications could the Mayor's limitless discretion become limited. As this Court ruled in *Bd. of Airport Comm'rs*, 55 U.S.L.W. at 4857, "the chilling effect . . . on protected speech in the meantime would make such a case-by-case adjudication intolerable."

4. The City's reliance on *Greer v. Spock* is misplaced.

Relying on *Greer v. Spock*, 424 U.S. 828 (1976), the City and its amici claim that the Plain Dealer cannot challenge the Ordinance on its face, but must instead apply for a permit and then adduce evidence of arbitrary denial. (City Brief 42; National League of Cities Brief 21-22.) They misread *Greer*.

The military regulation at issue in *Greer* banned the distribution of literature on a military base without the prior approval of the base commander. In ruling that the regulation was not invalid on its face, the Court was careful to emphasize that the regulation did not vest officials with unfettered authority to decide which literature could be circulated and which could not. Instead, the regulation contained explicit standards limiting the commander's authority:

[I]t is to be emphasized that . . . [t]he only publications that a military commander may disapprove are those that . . . constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical—even unfairly critical—of government policies or officials. . . ."

424 U.S. at 840 (quoting an Army Dept. letter).

Unlike *Greer*'s military regulation, Lakewood's ordinance contains no standards to limit the exercise of offi-

cial discretion. *Greer*, therefore, does not apply to this case.¹³ This Court has repeatedly held that one has standing to challenge an ordinance "on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not [one has] applied for a license." *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (and cases cited therein); see *Steffel v. Thompson*, 415 U.S. 452 (1974).

5. The right to be free from a threat of censorship is separate and distinct from the right of access to public property.

The City argues that the cases invalidating standardless licensing discretion do not apply to this case because, it claims, there is no First Amendment right to use newsracks on public ways to distribute newspapers. The City and its amici contend that, if newsracks may be prohibited altogether, there is no constitutional infirmity in providing City officials with unlimited authority to allow or prohibit newsracks. The City and its amici confuse the right of access to public property with the right to be free from a threat of censorship.

As will be shown, the Plain Dealer has a First Amendment right to distribute its newspapers to the public by placing newsracks at appropriate places on public ways. But even if there were no such right, the Ordinance would still violate the First Amendment because it permits City officials to engage in censorship.

13. Furthermore, *Greer* involved access to a military base which, as distinguished from Lakewood's public sidewalks, is not a traditional public forum for expressive activities. Nevertheless, standardless licensing discretion violates the First Amendment regardless of whether the licensed activity is to take place on public forum or nonpublic forum property. See *Bd. of Airport Comm'rs*, 55 U.S.L.W. at 4857.

Regardless of whether government as "property owner" may ban certain expressive activities from public property, it cannot delegate authority which allows its officials to base prohibitions on the content of the speaker's message. Thus, in *Bd. of Airport Comm'rs* this Court declined to decide whether officials could ban the distribution of religious literature in an airport, but ruled that unlimited authority to allow or disallow such activity violated the First Amendment. 55 U.S.L.W. at 4857. Similarly, in *Cox* this Court ruled that it need not decide whether parades could be totally prohibited on public ways because officials had unbridled discretion to allow or disallow particular parades. The Court stated:

We have no occasion in this case to consider the constitutionality of the uniform, consistent, and non-discriminatory application of a statute forbidding all access to streets . . . for parades and meetings.

.
It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power. . . .

379 U.S. at 555, 557. The final phrase in the above ruling describes precisely the licensing provisions at issue in this appeal, and this Court need go no further to decide this case.

As Lakewood's permit scheme contains no standards to restrict the exercise of discretion by the Mayor and the Architectural Board, the Court of Appeals' rulings are entirely consistent with this Court's rulings and must be affirmed.

II. THE CONSTITUTIONALITY OF AN ABSOLUTE PROHIBITION OF THE DISTRIBUTION OF NEWSPAPERS BY MEANS OF NEWSRACKS IS OUTSIDE THE SCOPE OF THIS APPEAL.

As shown, this Court need not look beyond the Ordinance's licensing provisions to decide this appeal. Nevertheless, the City attempts to secure a holding that an absolute ban of newsracks on all public ways would be constitutional. The City ignores this Court's tradition of formulating rules of constitutional law no broader than the "precise facts" of the case require. *E.g.*, *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1588 n.4 (1986); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis J., concurring). The facts of this case do not present an issue of whether an absolute ban is constitutional. The City abandoned that issue during the course of this litigation.¹⁴ Whether the City can ban newsracks from all public ways is therefore a hypothetical question and outside the scope of this appeal.

Even if *arguendo* an absolute ban issue were actually presented by this appeal, this Court's precedents compel the conclusion that a total prohibition of newsracks on public thoroughfares would violate the First Amendment. The placement of newsracks on public ways is a fully protected means of circulating daily newspapers directly to the public.

14. When the District Court ruled against Lakewood's initial prohibition of newsracks, Lakewood chose to amend its ordinance rather than appeal. See 794 F.2d at 1141-1143. The amended ordinance, which is at issue here, does not impose an absolute ban. Indeed, the propriety of an absolute prohibition was not even briefed or argued before the Court of Appeals, nor did Lakewood present that question in its Jurisdictional Statement seeking this Court's review.

III. AN ABSOLUTE PROHIBITION OF THE DISTRIBUTION OF NEWSPAPERS BY MEANS OF NEWSRACKS WOULD VIOLATE THE FIRST AMENDMENT.

A. Absent A Compelling Governmental Interest, The City May Not Exclude From Its Public Streets And Sidewalks A Manner Of Expression That Is Compatible With The Normal Uses Of That Property.

1. The City's streets and sidewalks are traditional public forums for expressive activities.

The mere fact that the government acts as a property owner does not give it the unrestrained right to prohibit expressive activity. *E.g.*, *Jamison v. Texas*, 318 U.S. 413, 415-416 (1943). The government's interest in limiting the use of its property must be balanced against the right to free expression guaranteed by the First Amendment. Where the property in question is a traditional public forum, the government's ability to limit expressive activity within that property is "sharply circumscribed." *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Traditional public forum property includes public places which historically have been associated with the free exercise of expressive activities. *United States v. Grace*, 461 U.S. 171, 177 (1983). Because public streets and sidewalks are the "natural and proper places for the dissemination of information and opinion," *Schneider v. State*, 308 U.S. 147, 163 (1939), they are quintessential public forums:

Sidewalks, of course, are among those areas of public property that traditionally have been held open to the

public for expressive activities and are clearly within those areas of public property that may be considered generally without further inquiry, to be public forum property.

Grace, 461 U.S. at 179; accord *Hague v. C.I.O.*, 307 U.S. 496, 515-516 (1939). Thus, the public property at issue in this case—Lakewood's major public thoroughfares—is a traditional public forum.

2. Where a manner of expression is not "basically incompatible" with the normal uses of public forum property, the City may not exclude it, except to further a compelling governmental interest.

While the regulation of particular manner of expression must further a substantial or significant governmental interest, the total prohibition of a particular manner of expression must satisfy a far more demanding standard. An absolute prohibition within public forum property of a particular manner of expression violates the First Amendment unless the prohibition is narrowly drawn to advance "a compelling governmental interest." *Grace*, 461 U.S. at 177. Applying that principle, this Court held in *Grace* that the prohibition of picketing on a public sidewalk violated the First Amendment even though other types of expressive activity were allowed. See 461 U.S. at 181 n.10.

The initial question in determining the validity of an exclusion of a particular type of expressive activity is whether the activity is "basically incompatible" with the normal uses of the property in question. In *Schad v. Mount Ephraim*, this Court stated:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place,

and manner that are reasonable." . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

452 U.S. 61, 75 (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116-117 (1972)); see *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2038 (1986) (remand to determine compatibility of cable television lines with public property); *Tinker v. Des Moines School District*, 393 U.S. 503, 508, 512-513 (1969) (wearing black armbands as a means of protest was compatible with normal activity in public school); *Schneider*, 308 U.S. 147 (distribution of handbills is compatible with ordinary street uses).

In summary, where a particular type of expressive activity is not "basically incompatible" with the normal uses of public forum property, a municipality cannot prohibit that activity except where necessary to further a compelling government interest.

B. The Plain Dealer Has A First Amendment Right To Distribute Newspapers From Newsracks Placed At Appropriate Locations On Lakewood's Major Public Thoroughfares.

1. The circulation of newspapers by means of newsracks is not "basically incompatible" with the normal uses of Lakewood's major thoroughfares.

With respect to Lakewood's major public ways, newsracks pass the *Grayned* compatibility test which this Court applied in *Schad*. Detroit and Madison avenues contain the usual appliances found along city streets to facilitate communication. Telephone booths, mail boxes, and utility devices appear at various locations. (J.A. 179,

180.) Accordingly, the use of small newsracks to distribute newspapers to passersby is entirely consistent with the normal pattern of activities on those streets. (J.A. 240-243.) As one federal court observed, newsracks "seem at home" in commercial urban areas. *Southern New Jersey Newspapers, Inc.*, 542 F. Supp. at 187.

The use of newsracks to distribute newspapers is not "basically incompatible" with the normal uses of Detroit and Madison, so long as they are placed at locations where they will not interfere with other ordinary activities on those streets and sidewalks. At trial, City officials testified that newsracks placed at the sites proposed by the Plain Dealer would not interfere with the public's ordinary uses of Detroit and Madison. (J.A. 117, 126.) In view of their small size (less than 1½ feet square) and communicative function, newsracks are entirely compatible with other ordinary activities on Lakewood's major public ways.

The evolution of public street uses as recognized by state law buttresses that conclusion. Historically, public thoroughfares have been used to facilitate changing modes of communication:

In our judgment, public highways . . . are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed.

Cater v. Northwestern Tel. Exchange Co., 63 N.W. 111, 112-113 (Minn. 1895); accord *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258 (1885); *McCann v. Johnson County*

Telephone Co., 76 P. 870, 871-872 (Kan. 1904); *Kirby v. Citizens' Telephone Co.*, 97 N.W. 3, 4-5 (S.D. 1903).¹⁵

Ohio courts subscribe to this view. *N.O. Stone v. Cuyahoga Light Co.*, 20 Ohio Dec. 130, 137 (C. P. Cuyahoga Co. 1909) (following *Cater*); see *Smith v. Central Power Co.*, 103 Ohio St. 681, 691, 137 N.E. 159, 163 (1921) (Marshall, C. J., concurring); *Sorg v. Oak Harbor*, 20 Ohio App. 313, 315, 151 N.E. 800 (1925).

As society has advanced, devices have replaced travelers on city streets. Telephone appliances and other devices which facilitate communication have become commonplace on the city streetscape and coincide with the developing uses of city streets:

It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. It would be more correct to say that present uses are the progression and modern development of the same uses and purposes. The new appliances are but rapid transit methods of supplying the modern wants of the people, the wires supplanting the messenger, the carrier and the postman, and the rails and pipelines supplanting in part the vehicular traffic.

Smith, 103 Ohio St. at 693, 137 N.E. at 163 (Marshall C. J., concurring);¹⁶ accord *Kirby*, 97 N.W. at 4 (telephone de-

15. These cases involve challenges by taxpayers or abutting property owners to municipal authorization of the installation of telephone appliances along public ways. The plaintiffs claimed that the placement of those devices on public streets violated the intended uses of the streets. The courts rejected those challenges.

16. At one time, the Ohio Supreme Court limited this principle to urban ways, rejecting its application to non-municipal highways. *Ohio Bell Telephone Co. v. Watson Co.*, 112 Ohio St. 385, 147 N.E. 907 (1925). The Court later abolished that distinction. *Ziegler v. Ohio Water Service Co.*, 18 Ohio St. 3d 101, 347 N.E.2d 728 (1969).

vices merely replace "the messenger and carrier of former times"); *Julia Building Ass'n*, 88 Mo. at 268-269.

Just as telephones have replaced foot messengers on city sidewalks, newsracks have replaced newspaper hawkers on street corners. As small devices that facilitate public access to newspapers, newsracks coincide with the historic and evolving uses of public ways. Thus, newsracks are compatible with normal street activities and, applying *Grayned* and *Grace*, the Plain Dealer has a First Amendment right to use newsracks to circulate newspapers on Lakewood's major public ways.

2. Lakewood asserts no compelling governmental interest to justify an absolute prohibition of newsracks.

Like other protected means of expression, newsracks are subject to reasonable regulations, but the City cannot prohibit them altogether except when necessary to further a compelling government interest. The City has articulated no such interest.

The City cites its interest in safety, but its own officials testified that they foresee no difficulty with placing newsracks at the sites proposed by the Plain Dealer. (J.A. 126, see J.A. 117.) Also, the record contains no evidence of accidents or injuries caused by newsracks. The City can satisfy its safety needs through reasonable place and manner regulations without resorting to an absolute ban.

The City also asserts an aesthetic interest. Again, the testimony of those City officials belies any claim that a total prohibition is necessary to preserve the aesthetic character of those streets. As with its safety concerns, the

City can satisfy its aesthetic needs through reasonable, narrowly drawn regulations far short of an absolute ban of newsracks. Moreover, this Court has never held that aesthetic concerns qualify as a compelling governmental interest.

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984), is not to the contrary. In *Vincent*, this Court emphasized that the plaintiffs sought access to "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." 466 U.S. at 814-815. For that reason, the Court applied the less demanding "substantial governmental interest" test in ruling that aesthetic concerns justified an absolute ban of posting signs on that property. See 466 U.S. at 807. This case, however, involves public sidewalks, a traditional forum for communication. *Grace*, 461 U.S. at 177. Consequently, Lakewood must satisfy the far more demanding standard of showing a *compelling* governmental interest to justify a total ban of newsracks. See *Grace*, 461 U.S. at 177. (See pp. 26-27, *supra*.)

Because Lakewood asserts no compelling interest to justify banning newsracks altogether, an absolute prohibition of newsracks throughout Lakewood's public ways would violate the First Amendment.¹⁷

C. The City's Argument Against First Amendment Protection Of Newsracks Is Invalid.

Lakewood's argument against First Amendment protection for newsracks is based on three major misconceptions. First, the City contends that First Amendment pro-

17. In *Providence Journal Co.*, the court inappropriately applied the less exacting "substantial governmental interest" test, but nevertheless ruled that aesthetic concerns could not justify a total ban of newsracks along all public thoroughfares. (See addendum at A1.)

tection is limited to peripatetic expression. Second, the City asserts that the placement of newsracks would create a property interest in City land. Third, the City claims that the availability of privately owned stores for newspaper distribution would justify an absolute ban of newsracks on all public thoroughfares. None of these suppositions is correct.

1. First Amendment protection is not limited to peripatetic expression.

a. Motion is not the law of the streets.

The City contends that the First Amendment applies only to "persons" who are "peripatetically" and "transiently" disseminating information on public streets. (City Brief 22-23.) According to the City, First Amendment protection is limited to personal, transient expression because other, more stationary means of communication would conflict with the intended uses of the streets for travel. (City Brief 9, 10, 22.) The City ignores the *Grayned* compatibility test and the full dimension of ordinary street uses. As previously discussed, the use of newsracks to distribute newspapers is fully compatible with the normal pattern of activities on City streets. Furthermore, as long ago as 1885, state courts rejected the notion, advanced 100 years later by Lakewood, that movement is an essential component of an appropriate street use. As the *Cater* court ruled:

It is said that "the primary law of the street is motion." It is true, motion is the law of the street, in the sense that the person or thing to be transmitted must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move.

63 N.W. 111, 113; accord *Julia Building Ass'n*, 88 Mo. at 270 (referring to the motion argument as "more specious than sound"); see *N.O. Stone*, 20 Ohio Dec. at 137.

The City acknowledges that privately owned, stationary devices on City streets do not conflict with ordinary street uses, but insists that only those instrumentalities providing "essential" public services conform with proper street uses. (City Brief 9-10.) The City overlooks the First Amendment's pronouncement that the press' communication of information is an essential public service. *E.g.*, *Minneapolis Star and Tribune Co.*, 460 U.S. at 585; *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1966).

Additionally, the City ignores even municipal law. Recognizing the continuing evolution of the uses of public streets, the Ohio Supreme Court has ruled that the installation of cable television devices along public ways conforms with their intended uses. *Vernon v. Warner Amex Cable Communications, Inc.*, 25 Ohio St. 3d 117, 122-123, 495 N.E.2d 374, 378 (1986) (Douglas, J. concurring); see *Bramson v. City of Berea*, 33 Ohio Misc. 186, 189, 293 N.E.2d 577, 581 (C.P. Cuyahoga Co. 1971).

The above principles demonstrate that the intended use of city streets is not limited to moving pedestrian and vehicular traffic. One of their fundamental purposes is to facilitate communication. Instrumentalities which benefit the public in achieving that purpose, without unduly interfering with other street activities, have long been a component of urban public ways. Lakewood, therefore, cannot base its transient speech theory on the notion that only peripatetic activities conform with the ordinary uses of City streets.

b. *Taxpayers for Vincent* does not limit First Amendment protection to peripatetic expression.

In *Taxpayers for Vincent*, this Court stated that the First Amendment right to distribute literature on public streets does not extend to the posting of signs on utility poles. 466 U.S. at 809-810. The City concludes from the Court's statements that only personal, transient expression enjoys First Amendment protection on public ways. (City Brief 23.)

This Court's subsequent ruling in *Preferred Communications, Inc.*, 106 S. Ct. 2034, demonstrates that the City misreads *Vincent*. In *Preferred Communications, Inc.*, this Court ruled that a cable television company stated a claim under the First Amendment by alleging a right of access to municipal property for the transmission of television programs via cable lines. That mode of communication is distinctly stationary and mechanical, not personal and peripatetic.

In discussing *Vincent*, the City ignores the *Vincent* Court's emphasis that utility poles are not public forum property. Moreover, the Court's distinction between handbill distribution on public ways and sign posting on utility poles was not an announcement that only personal, transient means of communication enjoy First Amendment protection.

The *Vincent* Court described the right to distribute handbills protected in *Schneider*, 308 U.S. 147, as the right "to tender the written material to the passerby who may reject it or accept it. . . ." 466 U.S. at 810. The Court did not state that the means of tendering that material must be personal and peripatetic rather than

stationary and mechanical. Rather, it distinguished the direct, active communication involved in handbill distribution from the abandonment of communication resulting from the indiscriminate posting of campaign signs on utility poles. 466 U.S. at 809. The Court likened the posting of signs on poles to tossing "large quantities of paper from the window of a tall building or a low flying airplane" and thereafter abandoning it. 466 U.S. at 809. That analogy does not apply to newsracks.

Like the pamphleteer protected in *Schneider*, newsracks tender literature to passersby. Over 21,000 people use the Plain Dealer's newsracks every weekday to obtain the latest news and commentary. On Sundays, over 5,500 people use them. (J.A. 61, 74.) Far from abandoning its newsracks, the Plain Dealer fills them daily with new issues of its newspaper, and removes the racks when the public ceases to use them regularly. (J.A. 81.) Through newsracks, the Plain Dealer is exercising the right protected in *Schneider* to "communicate directly with potential recipients of [its] message[s]," 466 U.S. at 809, and it continues that conduct only so long as those potential recipients actively and regularly choose to receive those messages.

Thus, not only does Vincent fail to support the City's peripatetic speech theory, but its articulation of the right protected in *Schneider* applies with equal force to the distribution of newspapers from newsracks.¹⁸

18. In support of its theory that the First Amendment does not protect the use of newsracks to distribute newspapers on public ways, the City also relies on *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893) and *Packard v. Banton*, 264 U.S. 140 (1924). (City Brief 20-21, 26.) Neither of those cases involved any First Amendment issue, and both

(Continued on following page)

2. The placement of newsracks on public forum property does not create a property interest in that property.

The City claims that, by asserting a First Amendment right to place newsracks on public forum property, the Plain Dealer seeks a compelled leasehold in City property. (E.g. City Brief 24, 42.) The Plain Dealer seeks neither a leasehold nor any other property right in City property.

A leasehold is a possessory estate in land, entitling the lessee to exercise physical control over a particular parcel of land for general purposes. E.g., *Pitts v. Cincinnati Metropolitan Housing Authority*, 160 Ohio St. 129, 138, 113 N.E.2d 869, 875 (1953). Also, in the absence of restrictions to the contrary, a lessee may assign or sublet his leasehold to others of his choosing. E.g., *Herron Co. v. Jones*, 28 Ohio App. 190, 195, 162 N.E. 624, 626 (1927).

The Plain Dealer does not seek to control a specific parcel of City property. Nor does it seek to occupy City property for general purposes, or to have the right to "assign" to others the locations where its newsracks would be placed. A mere physical presence on land does not create "possession" even if the presence is continuous. Thus, an Ohio court ruled that an agreement allowing the placement of signs "on any part" of another's property and which gives no estate in or right to control the land created "no interest in the land." *Ohio Valley Advertising Corp. v. Linzell*, 107 Ohio App. 351, 354, 152

Footnote continued—

were decided before this Court first acknowledged that the First Amendment applies to the actions of local governments. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the First Amendment to the states).

N.E.2d 380, 383 (1957), *aff'd*, 168 Ohio St. 259, 153 N.E.2d 773 (1958).

In light of the above principles, the First Amendment right to place newsracks at appropriate locations on public forum property does not create a property interest or leasehold in City property.

3. The availability of stores for the distribution of newspapers cannot justify an absolute prohibition of newsracks on the City's major public thoroughfares.

Lakewood argues that the availability of stores within Lakewood and its vicinity would justify an absolute prohibition of newsracks on the City's public thoroughfares. This Court has repeatedly rejected analogous arguments.

The availability of private facilities cannot justify a prohibition of a particular expressive activity in appropriate places. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69-70 n.18 (1983); *Schad*, 452 U.S. at 76-77; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 n.15 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider*, 308 U.S. at 163; *Providence Journal Co.*, addendum at A1 (newsracks); *Philadelphia Newspapers, Inc.*, 381 F. Supp. at 242 n.8 (newsracks).

If a prohibition of newsracks could be justified solely because newspapers may be distributed through stores, then the distribution of individual copies of newspapers would be controlled by the local sympathies and business decisions of private store owners who are not under the Plain Dealer's control or subject to constitutional constraints. "It hardly answers one person's objection to

a restriction on his speech that another person, outside his control, may speak for him.'" *Arkansas Writers' Project, Inc.*, 107 S. Ct. at 1728 (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring)).

Furthermore, the unique nature of newsracks renders inadequate the availability of stores. The First Amendment protects the right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. International Society For Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

Newsracks on public thoroughfares are peculiarly suited to reach individuals who do not ordinarily seek out newspapers. Newsracks reach those passersby who decide to read a particular issue or a particular paper only because they happen to notice the day's top news or sports headline through a newsrack window. Even if those individuals do happen into a store which sells newspapers, the day's headlines may be buried under the counter or stacked in a remote corner. Because of their location on public thoroughfares, newsracks provide the press with an otherwise lost opportunity to "reach the minds of willing listeners." And, newsracks provide those listeners with an opportunity to avail themselves of news and information which would not otherwise come to their attention. Newsracks are unique and essential to newspaper publishers and readers in a variety of other ways, which are explained in detail in the brief of Amicus Curiae American Newspaper Publishers Association et al.

In accordance with the above principles, an absolute ban of newsracks on Lakewood's major public thoroughfares would violate the First Amendment.

IV. THE COURT OF APPEALS RULED CORRECTLY THAT THE CITY MAY NOT REQUIRE NEWSPAPER PUBLISHERS TO INDEMNIFY AND INSURE THE CITY.

A. Regulations Which Impose Discriminatory Burdens On The Press Violate The First Amendment.

The Court of Appeals ruled that the City's ordinance violates the First Amendment by unjustifiably singling out the press to bear the burden of indemnity and insurance. This Court should affirm.

Regulations which single out the press are subject to strict First Amendment scrutiny. *Minneapolis Star and Tribune Co.*, 460 U.S. at 585-86 n.7; see *Preferred Communications, Inc.*, 106 S. Ct. at 2038. Such regulations violate the First Amendment unless justified by an overriding government interest that cannot be furthered except through differential treatment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 585, 592 (a regulation that singles out the press places "a heavy burden on the state to justify its action"). This Court has stated:

[D]ifferential treatment, unless justified by some special characteristic of the press suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.

Minneapolis Star & Tribune Co., 460 U.S. at 585.

As the Court of Appeals ruled, Lakewood's indemnity and insurance requirement is unconstitutional because it applies only to the press.

B. Lakewood's Indemnity And Insurance Requirement Violates The First Amendment.

1. Absent fault on the part of the City, newsracks pose no liability risk to Lakewood.

Newsracks placed on public thoroughfares pose no liability risk to the City unless the City is at fault. Although the City is liable under Section 723.01, Ohio Revised Code, for injuries caused by "nuisances" on its sidewalks, Ohio specifically rejects the notion that every object on the street constitutes a nuisance.¹⁹ So long as an object does not unreasonably interfere with ordinary sidewalk uses, serves a useful purpose, and is not unreasonably dangerous, it does not constitute a nuisance. *E.g. Kellogg v. Cincinnati Traction Co.*, 80 Ohio St. 331, 346, 348, 350, 88 N.E. 882, 886-887 (1909); *Morton v. Coles*, 14 Ohio App. 209, 213, 216 (1921); *Salzer v. Bolus-Hackett*, 24 Ohio Dec. 369, 16 N.P.(n.s.) 358, 368 (C.P. Clark Co. 1914).

The City is not strictly liable even for injuries caused by nuisances. The City is liable only if it received notice of a dangerous condition amounting to a nuisance and failed to take reasonable measures to correct the condition. *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 446-447, 55 N.E.2d 724, 733 (1944). In *City of Cincinnati v. Fleischer*, the Ohio Supreme Court ruled that a city is not liable simply because a person falls over an object placed in the street. The Court ruled:

[Cities] are not required to . . . prohibit such usual erections in proper portions of the streets as public convenience requires.

19. The City states that it lost sovereign immunity by judicial decision, but neglects to mention that the Ohio legislature has since restored limited sovereign immunity by enacting Chapter 2744 of the Ohio Revised Code. (Ch. 2744 is reported in the addendum to this brief.)

63 Ohio St. 229, 234, 58 N.E. 568, 569 (1900); see *Strunk v. Dayton Power & Light Co.*, 6 Ohio St. 3d 429, 453 N.E.2d 604 (1983) (city not liable for injuries caused by auto colliding with utility pole).

Nor will the City be liable for auto accidents caused by drivers who stop illegally to use newsracks. As an Ohio court put it, "[t]he mere fact that a motorist, by his selfish and willful, perhaps criminal, misconduct," caused a collision with city property in the street does not render the city liable therefor. *Ankenbrant v. City of Toledo*, 45 Ohio App. 400, 402, 187 N.E. 82, 83 (1933). That reasoning applies with equal force where a driver illegally stops to use a newsrack placed on City property. *Southern New Jersey Newspapers, Inc.*, 542 F. Supp. at 186 ("[I]t is the responsibility of motorists, and not of newspapers, to insure that traffic laws are obeyed"). Thus, despite the City's claims to the contrary, newsracks pose no liability risk to the City unless the City itself is at fault.

2. Newsracks pose no different liability risk than that posed by other objects or structures on Lakewood's public ways.

Section (c)(5) of the Ordinance requires the press to indemnify the City for "all liability for any reason whatsoever occasioned upon the installation and use" of a newsrack. That section also requires the press to insure the City for "all claims . . . which may arise from" the use of newsracks on City streets. (J.A. 282-283.)

The Ordinance's broad language ("occasioned upon," "arise from") necessarily encompasses liability arising solely from the City's negligent, reckless, or even intentional conduct. On its face, the Ordinance requires the

press to subsidize the City for the City's own misfeasance. The City offers no justification for this compelled subsidization and, indeed, there is none.

Even if the indemnity and insurance requirement covered only liability and claims caused by newsracks, it would still violate the First Amendment. The City does not require bus and telephone companies to indemnify and insure the City as a condition for placing their bus shelters or telephone booths on public ways. Nor does the City require any other user of those ways to provide indemnity and insurance.²⁰ The City's indemnity and insurance requirements apply only to newspaper publishers and distributors. The City identifies no reason why newsracks would pose any greater liability risk than the much larger bus shelters, telephone booths, and other stationary objects already on its public ways.

The Plain Dealer has received no complaints of serious harm or safety problems in connection with any of its 2,000 newsracks (J.A. 61), and the record contains no evidence of any claims or accidents caused by newsracks. The City points to over 150 accidents in 1983 involving telephone booths, utility poles, and mail boxes (J.A. 143), yet the City does not impose indemnity and insurance requirements on the telephone company or the utility companies.

The City's only explanation for its discriminatory treatment of the press is that the telephone company and the utility companies are "quasi-governmental" entities

20. The City complains that the record contains no evidence of differential treatment, but counsel for the City admitted at oral argument before the Court of Appeals that the City does not impose indemnity and insurance agreements on other users of its public ways. See 794 F.2d at 1147.

providing services "directly related to the public health, safety and welfare." (City Brief 16, 35.) The City's argument is specious. It ignores the First Amendment's declaration that communication of information by the press is essential to the public welfare. It also ignores this Court's ruling that privately held utilities are not quasi-governmental entities. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Moreover, the status of private utilities or the nature of the services they render in no way reduces the liability risk to the City, if any, posed by the structures that they place on City streets. Indeed, given the record in this case of numerous accidents involving those objects and none involving newsracks, the City would have greater justification for requiring indemnity from telephone and utility companies instead of newspaper publishers.

The City's indemnity and insurance requirements are unjustified because there is no evidence that newsracks pose a liability risk to the City that is any greater than that posed by mailboxes, telephone booths and bus shelters which are not subject to those requirements.²¹ Accordingly, the Court of Appeals ruling is correct and this Court should affirm.

21. One of the City's amici claims that there is actually no differential treatment because "[n]othing in the record suggests that similar insurance requirements would not be imposed on other vending machines if they were . . . on public property. . . ." (National League of Cities Brief 25.) That argument begs the question. There is no evidentiary basis or even a common sense basis for believing that vending machines pose any greater liability risk than the larger objects already on the street that are not subject to indemnity and insurance requirements.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

JAMES P. GARNER, *Counsel of Record*
KAREN B. NEWBORN
DAVID L. MARBURGER
BAKER & HOSTETLER

3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

BRUCE W. SANFORD
BAKER & HOSTETLER

1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500

PETER C. GOULD
BARRY N. STEINER
SABIN, BERMANT, AND BLAU

350 Madison Ave.
New York, New York 10017
(212) 953-0400

*Attorneys for Appellee Plain
Dealer Publishing Company*

ADDENDUM

**OPINION AND ORDER OF THE UNITED STATES
DISTRICT COURT, DISTRICT OF RHODE IS-
LAND IN PROVIDENCE JOURNAL COMPANY
ET AL. v. CITY OF NEWPORT**

(Dated June 12, 1987)

C. A. 86-0320-P

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

PROVIDENCE JOURNAL COMPANY, THE EDWARD
A. SHERMAN PUBLISHING COMPANY, THE NEW
YORK TIMES COMPANY, DOW JONES & COMPANY,
AND GANNETT SATELLITE INFORMATION
NETWORK, INC.,

v.

CITY OF NEWPORT.

OPINION AND ORDER

PETTINE, Senior District Judge. The question pre-
sented by this case is whether a municipality may ban
the placement of coin-operated newspaper vending ma-
chines, known as newsracks, upon its public rights of
way. The plaintiffs, five newspaper publishers, have
brought suit under 42 U.S.C. sections 1983 and 1988
seeking declaratory and injunctive relief against the city
of Newport, Rhode Island, which recently enacted such

a ban. The jurisdiction of the court is invoked pursuant to 28 U.S.C. sections 1331 (federal question) and 1343 (civil rights).

Presently before the court are the plaintiffs' motion for summary judgment and the defendant's cross-motion for summary judgment. For reasons discussed herein, I am granting summary judgment in favor of the plaintiffs.

I. FACTUAL BACKGROUND

Each of the five plaintiffs in this case publishes a daily newspaper that is distributed in the city of Newport, Rhode Island. The Providence Journal Co., a Rhode Island corporation, publishes each weekday morning and evening the Providence Journal and the Evening Bulletin; it also publishes the Journal Bulletin on Saturday and the Providence Sunday Journal on Sundays. The Edward A. Sherman Publishing Co., a Rhode Island corporation, publishes the Newport Daily News Monday through Saturday. The New York Times Co., a New York corporation, publishes the New York Times seven days a week. Gannett Satellite Information Network, Inc., a Delaware corporation, publishes USA Today Monday through Friday. Dow Jones & Co., Inc., a Delaware corporation, publishes the Wall Street Journal Monday through Friday. The defendant in this case, the city of Newport, is a public municipal corporation organized and existing under the laws of the state of Rhode Island.

Prior to March, 1986 the city of Newport allowed newsracks to be placed on public rights of way adjacent to buildings, vacant lots and street curbs, subject to various location, size, insurance and permit fee regulations. See Codified Ordinances of the City of Newport, Revision

of 1980, Chapter 842, "Newspaper Vending Devices."¹ On or about March 26, 1986 the Newport City Council enacted the following amendment to Chapter 842:

Chapter 842.02. "Location"

No newsrack shall be permitted on any public right of way within the City of Newport.

SECTION 2. This ordinance shall take effect June 1, 1986 and all ordinances or parts of ordinances inconsistent herewith are hereby repealed.

By letter dated May 16, 1986 the city of Newport notified several of the plaintiffs of its intention to enforce the foregoing ordinance and directed the plaintiffs to remove their respective newsracks from all public rights of way in the city by May 31, 1986. On May 29, 1986 the plaintiffs filed the instant action for declaratory and injunctive relief. A temporary restraining order was entered by this court on May 29, 1986, restraining the city of Newport from enforcing the challenged ordinance until further order of the court.

According to discovery undertaken by the defendant, the plaintiffs' newspapers are distributed throughout the city of Newport not only by newsracks on public rights of way, which would be banned by the ordinance, but also via newsracks on private property and retail establishments such as stores and newsstands, none of which would be affected by the ordinance. The precise figures obtained through discovery are as follows: outlets for the Providence Journal Co.'s newspapers include eight newsracks on public rights of way, seventeen newsracks

1. Exhibit A attached to plaintiffs' reply memorandum in support of plaintiffs' motion for summary judgment.

on private property and forty-four retail establishments; outlets for the Newport Daily News include ten newsracks on public rights of way, eleven newsracks on private property and forty-three retail establishments; outlets for USA Today include ten newsracks on public rights of way, ten newsracks on private property and fifteen retail establishments; outlets for the New York Times include eleven newsracks on public rights of way, eleven newsracks on private property and an unknown number of retail establishments. Precise figures regarding the Wall Street Journal were not made available by Dow, Jones & Co., Inc.

II. DISCUSSION

To grant a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the court must first find that there is no genuine issue of material fact, looking at the record and drawing all inferences in the light most favorable to the party opposing the motion. *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied* 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). If no material facts are in dispute, then summary judgment can be granted if the court further finds that the moving party is entitled to judgment as a matter of law, viewing the evidence in the light most favorable to the opposing party. *Cia. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985); *Irish Subcommittee v. Rhode Island Heritage Commission*, 646 F.Supp. 347, 351 (D.R.I. 1986).

In this case, with the above recited facts undisputed, the parties' motions for summary judgment turn solely on principles of First Amendment law. The First Amend-

ment to the Constitution provides in pertinent part, "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Through the due process clause of the Fourteenth Amendment, the strictures of the First Amendment apply with equal force to limit state action. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925). Because municipal legislation is a recognized category of state action, *Lovell*, 303 U.S. at 450, 58 S.Ct. at 668, the newsrack ban enacted by the city of Newport is subject to the First Amendment's proscriptions against state regulation of expressive activity.

A three-step inquiry must be undertaken to determine whether the challenged ordinance violates the proscriptions of the First Amendment: first, assessing whether the object of the challenged ordinance constitutes activity protected by the First Amendment; second, if protected activity is found, characterizing the particular forum in which the protected activity has been or is being attempted; and third, evaluating the state's proffered justifications for the challenged ordinance under the First Amendment standards applicable to the particular forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439, 3446-47, 87 L.Ed.2d 567 (1985); *Irish Subcommittee v. Rhode Island Heritage Commission*, 646 F.Supp. 347, 352 (D.R.I. 1986).

A. Protected Activity

The challenged ordinance prohibits, on all public rights of way, the distribution of newspapers via news-

paper vending machines, commonly known as newsracks. It has long been established that the First Amendment's guarantee of a free press necessarily protects the right to distribute newspapers. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *In re Jackson*, 96 U.S. 727, 733, 24 L.Ed. 877, 879 (1878); see also *Talley v. State of California*, 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960); *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938); *Gannett Satellite Information Network v. Town of Norwood*, 579 F.Supp. 108, 114 (D.Mass. 1984); *Rubin v. City of Berwyn*, 553 F.Supp. 476, 479 (N.D.Ill.), *aff'd.* 698 F.2d 1227 (7th Cir. 1982); *Miller Newspapers, Inc. v. City of Keene*, 546 F.Supp. 831, 833 (D.N.H. 1982). The protection accorded liberty of circulation is grounded not only in the newspaper's right of publication, but also in the public's right of access to newspapers. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980); *Philadelphia Newspapers Inc. v. Borough of Swarthmore*, 381 F.Supp. 228, 243 (E.D.Pa. 1974) (The state's interests "must be balanced [against] not only the right of the plaintiff to distribute its newspapers, but the right of the public to have access that is as free as possible as long as the means of distribution do not create *real* hazards. . . ." (emphasis in original)). As one court has observed, the right to receive information is "the indispensable reciprocal of any meaningful right of expression." *Sheck v. Bailyville School Committee*, 530 F.Supp. 679, 685 (D.Me. 1982). See also *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 866-67, 102 S.Ct. 2799, 2808, 73 L.Ed.2d 435 (1982); *Virginia State Board*

of Pharmacy v. Citizens' Consumer Council, Inc., 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976).

The reciprocal liberties of circulation and of access are protected by the First Amendment irrespective of whether the newspapers are to be distributed for free or for a fee. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11, 101 S.Ct. 2882, 2890 n.11, 69 L.Ed.2d 800 (1981); *Smith v. California*, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959); *Gannett Satellite Information Network v. Metropolitan Transit Authority*, 745 F.2d 767, 772 (2d Cir. 1984); *Wulp v. Corcoran*, 454 F.2d 826, 834-35 n.13 (1st Cir. 1972); *Gannett Satellite Information Network v. Town of Norwood*, 579 F.Supp. 108, 114 (D.Mass. 1984). Based on these considerations, I readily join the long line of precedents holding that coin-operated newspaper vending machines constitute a means of distributing newspapers that is entitled to full First Amendment protection. See *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1143 (6th Cir. 1986), *prob. juris. noted*, U.S., 107 S.Ct. 1345-46, 94 L.Ed.2d 517 (1987); *Gannett Satellite Information Network v. Metropolitan Transit Authority*, 745 F.2d 767, 772 (2d Cir. 1984); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984); *Gannett Satellite Information Co. v. Town of Norwood*, 579 F.Supp. 108, 114 (D.Mass. 1984); *Miller Newspapers, Inc. v. City of Keene*, 546 F.Supp. 831, 834 (D.N.H. 1982); *Southern New Jersey Newspapers, Inc. v. New Jersey Dept. of Transportation*, 542 F.Supp. 173, 183 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F.Supp. 228, 241 (E.D.Pa. 1974); *News Printing Co. v. Borough of Totowa*, 211 N.J.Super. 121, 511 A.2d 139, 143 (1986).

B. Characterizing the Forum

The degree to which the government may regulate communicative activity protected by the First Amendment depends upon the nature of the forum in which the First Amendment rights are sought to be exercised. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). For purposes of First Amendment analysis, three types of fora are recognized: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 105 S.Ct. at 3449.

The traditional public forum includes places such as streets and parks, which "by long tradition or by government fiat have long been devoted to assembly or debate," *Perry*, 460 U.S. at 45, 103 S.Ct. at 954; see also *Hague v. CIO*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). In these traditional public fora, "the rights of the state to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45, 103 S.Ct. at 954. The public forum created by government designation consists of public property that the state has opened for expressive activity, such as university meeting facilities, see *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), school board meetings, see *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976), and municipal theaters, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); see generally, *Perry*, 460 U.S. at 45-46, 103 S.Ct. at 955. "Although a State is not required to indefinitely retain the open character of [such a] facility, as long as it does so it is bound by the same standards as apply in

a traditional public forum." *Id.* The nonpublic forum consists of "public property which is not by tradition or design a forum for public communication," *id.*, and includes such communicative channels as government-sponsored charity solicitations in government workplaces, see *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), and the internal mail systems of public schools, see *Perry*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The nonpublic forum may be reserved by the state "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," *id.*, 460 U.S. at 46, 103 S.Ct. at 955.

In this case, the challenged ordinance bars the placement of newsracks "on any public right of way within the City of Newport." For purposes of newsrack regulation, the city of Newport defines a "public right of way" as "any public street, highway, sidewalk, parkway or alley," see Codified Ordinances of the City of Newport, Revision of 1980, Chapter 842, "Newspaper Vending Devices," section 842.01(b).² By its terms, the prohibition at issue is directed at protected First Amendment activity taking place entirely within a traditional public forum. "Traditional public forum property occupies a special position in terms of First Amendment protection," *United States v. Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702, 1708, 75 L.Ed.2d 736 (1983), such that the challenged ordinance faces an "especially heavy" burden of justification, *Southern New Jersey Newspapers, Inc. v. New Jersey Dept. of Transportation*, 542 F.Supp. 173, 185 (D.N.J. 1982).

2. Exhibit A attached to plaintiffs' reply memorandum in support of plaintiffs' motion for summary judgment.

C. *Evaluating the Regulation*

In a public forum, the state may not prohibit all communicative activity, *Perry*, 460 U.S. at 45, 103 S.Ct. at 955, but it may regulate communicative activity in accordance with either of two sets of criteria. On the one hand, communicative activity may be regulated based upon its content, but only if the state can show that such a regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.*; see also *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290-91, 65 L.Ed.2d 263 (1980), and cases cited therein. Alternatively, the state may regulate the time, place and manner of communicative activity in a public forum, provided the state can show that the regulation is content-neutral, is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. See *Perry*, 460 U.S. at 45, 103 S.Ct. at 955, and cases cited therein.

These principles require the court initially to determine whether the state's regulation of communicative activity constitutes a total prohibition, which is per se unconstitutional in the public forum, or whether it imposes a more selective limitation, which would merit further review under either of the aforementioned sets of criteria. Since the city of Newport has totally banned newsracks from its public rights of way, the question of totality versus selectivity turns on whether newsracks can be deemed an all-inclusive class of communicative activity by themselves, or whether they constitute one sub-class of some more broadly defined species of communicative activity. Upon reflection, I find the latter view more persuasive than the former. For purposes of First Amendment analysis, newsracks are functionally indistinguishable from newsstands and newsboys: all three serve as conduits

for the distribution of newspapers in public spaces. Accordingly, I find that the city of Newport's prohibition of newsracks from its public rights of way cannot be deemed a total prohibition of communicative activity in a public forum, and hence cannot be ruled per se unconstitutional.³ Cf. *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F.Supp. 228, 243 nn.9-10 and accompanying text (E.D.Pa. 1974) (finding unconstitutional, without reaching time/place/manner inquiry, an "ordinance [that] on its face might prohibit newsboys as well as newspaper boxes," thus "impermissibly restricting the distribution of newspapers." (citation omitted)).

Having found that the city of Newport has not totally banned the distribution of newspapers from its public rights of way, the court must next determine which set of criteria govern its review of the challenged ordinance. This determination turns on whether the newsrack ban is a content-based restriction of communicative activity, or

3. Focusing on the smallest general class of communicative activity (the distribution of newspapers) rather than the specific means of carrying it out (newsracks, newsstands, etc.) is relevant only in deciding whether the state has totally or selectively banned communicative activity in the public forum. This analytical framework should not be transposed onto the separate and prior inquiry into the scope and character of the forum.

In the latter inquiry, the different means of carrying out the same communicative activity may have legal significance. For example, if a state fair is held on public parkland, the subdivision of the parkland into separate booths leaves intact the public character of the parkland on which the booths rest, and thus creates a number of little public fora subject to the same First Amendment rules as the unenclosed areas of the park. See *Irish Subcommittee v. Rhode Island Heritage Commission*, 646 F.Supp. 347, 352-53 (D.R.I. 1986). In this situation, the state may not exclude certain groups from the use of booths, leaving them to roam the open fairground, by arguing that such groups could perform the same communicative activity on the fairgrounds, e.g. leafleting, as they desire to perform from the booths. *Id.*

whether it is a content-neutral time, place and manner regulation of such activity. Since the ban applies equally to all newsracks regardless of whose newspaper is carried inside and irrespective of the content of the particular newspaper, the ordinance is clearly content-neutral. See *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986); *Gannett Satellite Information Network v. Metropolitan Transit Authority*, 754 F.2d 767, 773 (2d Cir. 1984); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673-74 (11th Cir. 1984). As such, the ordinance may be reviewed under the criteria governing time, place and manner regulations of communicative activity. In addition to content neutrality, these criteria require proof of the following: (1) that the ordinance serves a significant government interest; (2) that the ordinance is narrowly tailored to serve that purpose; and (3) that the ordinance leaves open ample alternative channels of communication. See *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).

1. Significant government interest

The city of Newport has advanced two government interests to justify the newsrack ban. First, a safety rationale is asserted, encompassing both the flow of pedestrian traffic on sidewalks, especially during tourist season, and the flow of vehicular traffic near curbsides.⁴ As to the latter, the city contends that newsracks chained to utility poles are "prone to creeping out over the curb-side and thus being struck by oncoming vehicles," and

4. Defendant's memorandum in support of cross-motion for summary judgment ("Defendant's memorandum") at 4.

that one time "a newsrack was struck by a bus as it travelled down Bellevue Avenue in Newport."⁵ Second, the city asserts an aesthetic interest, based upon a submission of photographs allegedly depicting "the banged up, poorly maintained [and] rust infested condition" of the newsracks,⁶ and upon an affidavit by the City Manager characterizing the newsracks as "visual blight . . . which unreasonably detract from the aesthetics of the City of Newport."⁷

The city's burden here is twofold: to raise a significant government interest, and to show that the ordinance in question advances the asserted interest. As to the first of these burdens, both safety, see *Heffron v. International Society for Krishna Consciousness (ISKON)*, 452 U.S. 640, 650, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298 (1981); *Cox v. State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941), and aesthetics, see *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-807, 104 S.Ct. 2118, 2129-2130, 80 L.Ed.2d 772 (1984); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 507-508, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) (plurality opinion), are now broadly recognized as significant government interests.

Whether the ordinance has been shown to advance these interests, however, remains a more equivocal matter. Of the assorted safety interests, pedestrian traffic flow is the one most clearly advanced by the ordinance. Some of the photographs submitted show up to half the width of a sidewalk obstructed by three or four adjacent

5. *Id.*

6. *Id.* at 3 and exhibits 1-4.

7. Defendant's exhibit A.

newsracks.⁸ At such locations, any sizable flow of tourists⁹ would encounter pedestrian bottlenecks and very likely spill over into the street, creating significant safety hazards for themselves and for drivers. Handicapped pedestrians would be particularly disadvantaged by the loss of sidewalk space at these newsrack clusters. By clearing the sidewalks of all newsracks the ordinance clearly advances the city's safety interest in unobstructed pedestrian traffic flow.

The safety interest in unobstructed vehicular traffic flow is not so clearly advanced by the ordinance, however. The city of Newport has provided no explanation of the alleged tendency of newsracks to "creep" over curbsides into the streets. The city submitted sixteen photographs depicting forty newsracks on public rights of way. Of this total, only one newsrack is shown to be protruding over a curbside; the protrusion appears to be in the range of one or two inches; and the pavement over which it protrudes appears to be part of a parking area, not a street.¹⁰ The newsrack claimed to have been struck by an oncoming bus is depicted in a photograph of three newsracks chained to a utility pole at a yellow-painted curbside, presumably a bus stop.¹¹ None of the three newsracks protrudes into the street. Nor have the circumstances of the alleged collision been

8. See defendant's exhibit 4.

9. The court takes judicial notice of the fact that the city of Newport is one of Rhode Island's leading seaside resorts, frequented by many tourists during the summer. See Fed.R. Evid. 201(b)(1); cf. *Farmland Preservation Ass'n v. Goldschmidt*, 611 F.2d 233, 237 (8th Cir. 1979) (taking judicial notice of the fact that certain property within the jurisdiction consists of extremely valuable farm lands).

10. See defendant's exhibit 3.

11. See defendant's exhibit 2.

explained, either in the city's memorandum of law or in the affidavit of the city official claiming knowledge of the collision.¹² I therefore conclude that the only conceivable interference with vehicular traffic flow caused by newsracks derives from the aforementioned obstructions of pedestrian traffic flow, insofar as the latter causes pedestrians to walk in the streets where newsracks are inconveniently clustered.

The city's aesthetic interests are the ones least clearly advanced by the ordinance. To buttress its claim that the newsracks are eyesores, the city has described them as "banged up, poorly maintained [and] rust-infested."¹³ Yet of the forty newsracks depicted in the city's photographic exhibits, none appear rust-infested, all but one have well-maintained exterior graphics and paint jobs,¹⁴ and only five appear to have any dents, only one of which appears readily noticeable to the casual observer.¹⁵ Contrary to the city's description, the newsracks depicted by the city's exhibits are generally very well maintained, such that the particular condition of the newsracks cannot by itself be found to infringe the city's aesthetic interests.

Giving the city the benefit of the doubt, however, the argument is not just that most newsracks have dete-

12. See affidavit of Edward Williams, Zoning Inspector, ¶4, defendant's exhibit B.

13. Defendant's memorandum at 3.

14. One side of one USA Today newsrack displays what appears to be a ripped portion of a paste-on USA Today logo and a half-painted-over portion of a complete USA Today logo. See defendant's exhibit 3.

15. Moderate-sized dents appear in one USA Today newsrack, one Boston Herald newsrack, one Boston Globe newsrack and one New York Times newsrack, see defendant's exhibit 1, p.1. Large, highly visible dents appear in one New York Times newsrack, see defendant's exhibit 1, p.2.

riorated, but that even well-maintained newsracks are eyesores: as the City Manager stated, the ordinance was intended to accomplish, *inter alia*, the "removal of visual blight from the public rights-of-way which unreasonably detract from the aesthetics of the City of Newport."¹⁶ But although some individuals might view newsracks as eyesores, the question for the court is whether their elimination from the streets of Newport "would have more than a negligible impact on aesthetics," *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-31, 101 S.Ct. 2882, 2904, 69 L.Ed.2d 800 (1981) (Brennan, J., concurring). Courts have long recognized that aesthetics is not so much a matter of absolute standards as it is a function of context. Cf. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 742, 98 S.Ct. 3026, 3037, 57 L.Ed.2d 1073 (1978) ("[I]ndecency is largely a function of context—it cannot be judged in the abstract."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926) ("[T]he question whether a particular thing is a nuisance, is to be determined not by abstract consideration . . . but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."). Accordingly, the aesthetic impact of particular additions to a local environment will vary depending upon both the kind and amount of existing artificial encroachments upon the environment. As I have previously observed, in reviewing a state's prohibition of billboards on public highways:

Even assuming that a total ban . . . will produce some aesthetic gain in all highway areas, the quantum of

16. Affidavit of Francis C. Edwards, City Manager, ¶3, d, defendant's Exhibit A.

improvement will obviously vary with the site involved. In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefits will be great, for their removal would return the landscape to its pristine beauty. In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape.

John Donnelly & Sons v. Campbell, 639 F.2d 6, 23 (1st Cir. 1980) (concurring opinion), *aff'd.*, 453 U.S. 916, 101 S.Ct. 3151, 69 L.Ed.2d 999, *quoted in Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 531 n.8, 101 S.Ct. 2882, 2904 n.8, 69 L.Ed.2d 800 (1981) (Brennan J., concurring).

Of the forty newsracks depicted in the city's photographic exhibits, all are located along paved sidewalks that abut streets or parking lots, and all but one are chained to either a metal lamppost, a wooden telephone pole or a metal signpost. In three of the sixteen photographs, trash barrels or dumpsters are located within a few yards of the newsracks. As a New Jersey district court reviewing a similar ordinance found:

Much of the "natural-scenic beauty" sought to be enhanced appears to have been enhanced by stores, utility poles, commercial billboards, traffic signs, benches, fire hydrants, mail boxes, street signs and houses. In other words, the photographs show that many of the rights of way in question are located in populated, commercial areas where the boxes may even seem at home and not in unspoiled scenic countryside where the boxes might truly look out of place.

Southern New Jersey Newspapers, Inc. v. New Jersey Dept. of Transportation, 542 F.Supp. 173, 187 (D.N.J. 1982).

None of this is meant to suggest that newsracks could never infringe aesthetic interests outside of a pristine forest.¹⁷ But in the urban environment, to paraphrase Justice Brennan, the court "must be convinced that the city is seriously and comprehensively addressing aesthetic concerns." If newsracks alone are banned and no further steps appear likely, "the commitment of the city to improving its physical environment is placed in doubt." *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 531-32, 101 S.Ct. 2882, 2905, 69 L.Ed.2d 800 (1981) (concurring opinion); see also Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L. J. 439, 474-76 (1986).¹⁸ Viewed in this light, the city of Newport's news-

17. For instance, reconstructed historical communities such as Williamsburg, Virginia or Plymouth Plantations, Massachusetts could persuasively argue that even one prominently visible newsrack would seriously infringe their aesthetic interest in preserving a colonial American appearance. But an aesthetic interest in preserving an entire community's appearance would be hard to find in a city that has placed modern streets and conveniences alongside its historic buildings.

18. The need to carefully scrutinize aesthetic justifications for restrictions of expressive activity becomes even clearer upon reviewing the judicial history of the aesthetics rationale. As Professor Quadres points out, aesthetics was not initially regarded as a sufficient justification for restricting fully-protected categories of expressive activity. Quadres, *supra*, at 454-55, 458. Rather, aesthetic interests were first recognized in cases where a non-aesthetic principle supplied the primary justification for restricting speech protected by the First Amendment. In one class of cases, the Supreme Court recognized an aesthetic interest where the speech sought to be regulated already received less than full First Amendment protection, for reasons independent of aesthetic concerns. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57-58, 93 S.Ct. 2628, 2635, 37 L.Ed.2d 446 (1973) (recognizing valid aesthetic interest in barring cinema from screening obscene films even when admission is limited to adult-only audience); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-13, 101 S.Ct. 2882, 2893-95, 69 L.Ed.2d 800 (1981)

(Continued on following page)

rack ban cannot be justified as part of a serious and comprehensive attempt to address aesthetic concerns. See *Southern New Jersey Newspapers, Inc. v. New Jersey Dept. of Transportation*, 542 F.Supp. 173, 187 (D.N.J. 1982). I therefore find that the ordinance at issue fails to advance the city's aesthetic interests.

Footnote continued—

(plurality opinion) (recognizing valid aesthetic interest in prohibiting off-site commercial billboards, but finding ordinance unconstitutional on its face because it also prohibited noncommercial billboards, which were fully protected under the First Amendment); Quadres, *supra*, at 445-47, 461-62. In another class of cases, the Supreme Court gave its approval to regulations of speech deemed aesthetically offensive, but only insofar as the regulations were designed to ameliorate the adverse secondary effects imposed by such speech upon local neighborhoods. See *Young v. American Mini Theatres*, 427 U.S. 50, 56, 71 n.34, 96 S.Ct. 2440, 2445, 2453 n.34, 49 L.Ed.2d 310 (upholding local ordinance requiring geographic dispersal of "adult" theaters, concentrations of which were found to cause increased crime rates and decreased property values); Quadres, *supra*, at 454-59.

Restrictions upon fully-protected categories of speech solely for reasons of aesthetics were permitted only in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 89, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), which upheld a prohibition upon the posting of signs on public property, as applied to a city council candidate's campaign posters. 466 U.S. at 805-07, 104 S.Ct. at 2129-30; Quadres, *supra*, at 450-51, 461-62. Vincent thus represents a new and uncharted area of First Amendment law, placing courts in the novel position of reviewing restrictions upon protected speech by second-guessing aesthetic judgments, which "are necessarily subjective, defying objective evaluation, and [which therefore] must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Metromedia, supra*, 453 U.S. at 510, 101 S.Ct. at 2894 (plurality opinion).

It is worth noting that even the Vincent court apparently intended to limit the use of the aesthetics rationale, by insisting that the utility poles on which Vincent sought to hang his campaign signs constituted something less than a traditional public forum, 466 U.S. at 813-15, 104 S.Ct. at 2133-34. Leaving aside the possible criticism of this reasoning, see, e.g., Quadres, *supra*, at 451 n.64, the fact remains that the Supreme Court has not yet upheld a limitation of fully-protected speech in a traditional public forum for reasons of aesthetics.

2. Narrowly tailored means

After the interests served by the ordinance in question are ascertained, the court must determine whether the means chosen to advance the interests are narrowly tailored so as to avoid unnecessary restrictions of protected First Amendment activity. See *Grayned v. City of Rockford*, 408 U.S. 104, 116-17, 92 S.Ct. 2294, 2303-04, 33 L.Ed.2d 222 (1972) ("[T]he regulation must be narrowly tailored to further the State's legitimate interest."); see also *Schad v. Borough of Mount Ephriam*, 452 U.S. 61, 70, 101 S.Ct. 2176, 2183-84, 68 L.Ed.2d 671 (1981) (requiring review of zoning ordinances that restrict protected activity to "determine whether those [governmental] interests could be served by means that would be less intrusive on activity protected by the First Amendment. . . .").

Since I have found that the ordinance does not advance the city of Newport's aesthetic interests, the inquiry here is limited to the city's safety interests. As discussed in section II, C, 1, *supra*, the city's safety interests are implicated by the clustering of newsracks at certain sidewalk locations. By narrowing the sidewalk space available to pedestrians, such clustering increases the likelihood of bottlenecks, especially during the summer tourist season, which encourage pedestrians to walk in the streets, creating safety risks for pedestrians and motorists.

For the ordinance to survive constitutional scrutiny, the city must be able to show that nothing short of a complete newsrack ban on public rights of way could adequately alleviate the safety risks created where newsracks are clustered. The city's argument on this point consists of a conclusory assertion devoid of factual support: "the City of Newport has attempted over the years to control the placement and proliferation of newsracks on public

rights-of-way, . . . to no avail. The City would prefer that these newsracks be totally removed from public rights-of-way in Newport."¹⁹ Immediately following this statement, the city refers to the affidavit of its City Manager, Francis C. Edwards,²⁰ which provides only a list of policies sought to be vindicated by the ordinance.

These assertions fail to explain why a total ban would better alleviate the problem of clustering than would spreading out the newsracks more evenly. Since all but four of the forty newsracks in the city's photographs abut previously-installed poles or signposts, the city cannot reasonably argue that one or a few newsracks in a single line with a post would substantially reduce the available sidewalk space. The availability of solutions more narrowly tailored than a complete ban is amply demonstrated by the city's previous set of regulations governing newsracks. Without ruling on the validity of the previous regulatory scheme,²¹ the court notes that the prior ordinance

19. Defendant's memorandum at 4-5.

20. Defendant's exhibit A.

21. Potential constitutional problems with the prior newsrack ordinance include its requirement that an annual fee of \$50.00 per newsrack be paid by each permittee, section 842.03(g), and its requirement that the permittee indemnify the city for at least \$100,000 of the potential liability resulting from injuries to persons or property involving newsracks, section 842.04, Codified Ordinances of the City of Newport, Revision of 1980, Chapter 842, "Newspaper Vending Machines," defendant's exhibit A. Courts have ruled that, as applied to newsracks located in a public forum, fees exceeding the proportionate cost of administering the permit ordinance are unconstitutional. *News Printing Co. v. Borough of Totowa*, 211 N.J. Super. 121, 511 A.2d 139, 157-58 (1986); see also *Gannett Satellite Information Network, Inc. v. Metropolitan Transit Authority*, 754 F.2d 767, 774 (2d Cir. 1984) (dictum). Courts have also found indemnification requirements unconstitutional as applied to newsracks in a public forum. *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1146-47 (6th Cir. 1986); *News Printing Co. v. Borough of Totowa*, 211 N.J. Super. 121, 511 A.2d 139, 158 (1986).

included rules precisely targeted to the problem of newsrack clustering, including the following:

(b) *Location Specifications.* No newsrack shall be placed, installed, used or maintained:

* * * * *

(7) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six feet;

* * * * *

(10) Within 250 feet of another newsrack containing the same newspaper or news periodical except where separated by a street or corner; or

(11) Facing another newsrack, divided only by the width of a sidewalk or pedestrian walk.

Codified Ordinances of the City of Newport, Revision of 1980, Chapter 842, "Newspaper Vending Machines", section 842.05(b).²² The city has failed to offer any reason why its interest in maintaining safe pedestrian traffic flow could not be served by this ordinance or by some amendment thereof, e.g., an increase in the minimum sidewalk clearance specification above six feet, or a requirement that newsracks be arranged in linear rows rather than circular clusters. I therefore conclude that the city of Newport's newsrack ban fails the constitutional requirement that it be narrowly tailored, i.e., that it both serve the city's legitimate safety interest and that it avoid unnecessarily restricting protected First Amendment activity. Insofar as this opinion may be read as inviting the city of Newport to amend its ordinance, I must emphasize that my conclusion would be the same whether

22. Plaintiffs' exhibit A.

the ordinance banned newsracks on its face or only in its practical effect.

3. Ample alternative channels

To pass constitutional muster, an ordinance must satisfy *all* of the criteria by which time, place and manner regulations of expressive activity are measured; the case law lists these criteria as conjunctive requirements, not as alternative ones. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) ("The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (emphasis added)). Consequently, since the newsrack ban fails to serve the city of Newport's aesthetic interests and constitutes an insufficiently narrow means of advancing the city's safety interests, the ordinance is unconstitutional irrespective of whether it leaves open ample alternative channels of communication. See *Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 151-52, 84 L.Ed. 155 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

In light of these principles, consideration of the alternative newspaper distribution channels available to the plaintiffs is not necessary. But insofar as the case law cited by the city of Newport on this point reflects a substantial departure from the established analysis of time, place and manner regulations, I believe the city's argument merits further discussion. To show that the newsrack ordinance leaves ample alternative channels of

distribution open to the plaintiffs, the city has documented both the number of newsracks on private property currently operated by the plaintiffs and the number of private retail outlets that sell the plaintiffs' newspapers.²³ The city's emphasis on these private channels of distribution follows the reasoning of *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986), which relied upon the accessibility of private retail outlets and of newsracks on private property in concluding that a "total ban of newsracks in residential districts is a constitutional time, place and manner regulation." *Id.* at 1147.

By focusing on private communicative channels rather than alternatives available within the public forum, both the city of Newport and the *Plain Dealer* opinion misstate the applicable law. Ordinarily, when courts apply the ample alternative channels test to restrictions of expressive activity in a public forum, they consider the alternative channels left open within the public forum, not the alternatives available on private property. See *Heffron v. ISKON*, 452 U.S. 640, 654-55, 101 S.Ct. 2559, 2567-68, 69 L.Ed.2d 298 (1981), followed in *Hynes v. Metropolitan Government of Nashville and Davidson County*, 667 F.2d 549, 550-51 (6th Cir. 1982); *Olivieri v. Wood*, 766 F.2d 690, 694 (2d Cir. 1985); *United States v. Duff*, 605 F.Supp. 216, 218 (D.D.C. 1985); cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975) (ruling that the availability of a private theater "would not justify" a city's refusal to allow a performance of the musical play "Hair" in its municipal theater); *North Shore Right To*

23. Defendant's memorandum at 5, summarized in section I of this opinion, *supra*.

Life Committee v. Manhasset American Legion Post No. 304, 452 F.Supp. 834, 840 (E.D.N.Y. 1978) (ordering American Legion to allow anti-abortion group to march in Memorial Day parade, because requiring the group to march separately on the same public streets would "relegate them to an 'undignified position, behind the sweepers'").

Under *Plain Dealer's* contrary logic, the state would be allowed to restrict public forum access in inverse proportion with the availability of private communicative channels. Constitutional protections of expressive activity in public spaces would be allowed to expand and contract according to the shifting sympathies of local merchants and the oscillations of the business cycle. Such a restrictive view of public forum access neglects the practical difficulties faced by unpopular speakers and publications that seek to communicate a message to the community at large. "A speaker with a message that is generally unpopular or simply unpopular among property owners is hardly likely to get his message across" if forced to rely on private channels of communication that in theory remain open. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 820, 104 S.Ct. 2118, 2137, 80 L.Ed.2d 772 (1984) (Brennan, J., dissenting). As one commentator has pointed out, the fact that

private modes of expression, particularly the media, . . . may only be used at great expense, and in contrast to traditional [public] forums, ha[ve the] recognized power to exercise prior restraint on what [they] will disseminate, would seem to mandate greater, rather than lesser, protection of the traditionally low cost open forums, if for no other reason than to preserve a situs for voices otherwise lost in the wilderness.

Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 486 (1986).

The fact that the instant case involves established, well-financed newspapers rather than dissident journals published on a shoestring budget is irrelevant from a constitutional standpoint: today's best-seller once was, and may yet again be, just another struggling publication. In short, contrary to the reasoning of *Plain Dealer*, a city may not foreclose the press' right to distribute newspapers on its public streets and sidewalks merely because today's market conditions offer private outlets for such distribution. *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F.Supp. 228, 242 n.8 (E.D.Pa. 1974) ("[D]efendant's contention that the Philadelphia Inquirer is available from [private] sources within the Borough is, from a constitutional standpoint, irrelevant . . . The cases which have upheld prohibition of access or expression in a given location because of the existence of other available locations have based their decisions on the availability of an alternative public forum, not on the possibility that someone would make private property available for that purpose." (citations omitted) (emphasis in original)).

Accordingly, even if the city of Newport's newsrack ban were narrowly tailored to serve a significant government interest,²⁴ the city's cross-motion for summary judgment would fail for lack of proof that the ordinance left open ample alternative channels of communication within the city's public fora.

24. This aspect of the time, place and manner inquiry also appears to have been watered down by *Plain Dealer*. As discussed at length in subsections II, C, 1 and II, C, 2, *supra*, three separate inquiries are involved in determining whether an ordinance

(Continued on following page)

III. CONCLUSION AND ORDER

Relying on the parties' undisputed stipulations of fact, I have found that the city of Newport's prohibition of newsracks from all public rights of way constitutes a content-neutral regulation of protected First Amendment activity in a public forum. Applying the relevant First Amendment law I have further found that the ordinance cannot be upheld as a permissible time, place and manner regulation of expressive activity in the public forum.

Accordingly, I hereby grant the plaintiffs' motion for summary judgment and the declaratory and injunctive relief requested therein, and I hereby deny the defendant's cross-motion for summary judgment. The city of Newport's prohibition of newsracks from all public rights of way is hereby declared unconstitutional on its face and as applied, and the city of Newport is hereby ordered permanently enjoined from enforcing its unconstitutional newsrack ban.

So ordered.

Enter:

/s/ RAYMOND J. PETTINE

Senior U.S. District Judge

June 12, 1987

By Order,

/s/ CONCETTA R. ZINNI

Deputy Clerk

Footnote continued—

is narrowly tailored to serve a significant government interest; whether the government's asserted interests are significant; whether the ordinance furthers the asserted interest; and whether the ordinance is narrowly tailored so as to avoid unnecessarily restricting expressive activity. In *Plain Dealer*, the appeals court answered all three questions in one sentence, summarily affirming the district court's finding that "safety . . . and aesthetics are all substantial government interests and the subject ordinances reach no further than necessary to accomplish the City's objectives." 794 F.2d at 1147. In effect, *Plain Dealer* permitted a general assertion of safety and aesthetic interests to substitute for the requisite findings that the ordinance actually furthers the asserted interests and that the ordinance does not unnecessarily restrict expressive activity.

OHIO REVISED CODE

723.01 Legislative authority to have care, supervision, and control of streets.

Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance.

CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY

Section

- 2744.01 [Definitions.]
- 2744.02 [Classification of functions of political subdivisions; liability; exceptions.]
- 2744.03 [Defenses or immunities of subdivision and employee.]
- 2744.04 [Statute of limitations; demand for judgment.]
- 2744.05 [Limitations on damages awarded.]
- 2744.06 [Exemption from attachment; payment of judgments; annual installments.]
- 2744.07 [Defense and indemnification of employees; authority to settle.]
- 2744.08 [Liability insurance; self-insurance programs; waiver of immunity.]
- [2744.08.1] 2744.081 [Joint self-insurance pools; risk-management programs.]
- 2744.09 [Actions and claims exempted from provisions.]

§ 2744.01 [Definitions.]

As used in this chapter:

(A) "Emergency call" means a call to duty including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an independent contractor. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 [2151.35.5] of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare, that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons, and that is not specified in division (G) (2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace, to prevent and suppress riots, disturbances, and disorderly assemblages, and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or non-erection of traffic signs, signals, or control devices;

(k) The collection and disposal of garbage, refuse, and other solid wastes, including, but not limited to, the operation of dumps, sanitary landfills, and facilities;

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a health or human services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(o) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(p) Urban renewal projects and the elimination of slum conditions;

(q) Flood control measures;

(r) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(s) The issuance of revenue obligations under section 140.06 of the Revised Code;

(t) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state, provisions of charters, ordinances, resolutions, and rules of political subdivisions, and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 [713.23.1] of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, and regional council of political subdivisions established pursuant to Chapter 167. of the Revised Code.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies all of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by non-governmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery, or of a park, playground, playfield, zoo, zoological park, bath, indoor recreational facility, or swimming pool or pond;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, golf course, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

HISTORY: 141 v H 176 (Eff 11-20-85); 141 v H 205, § 1 (Eff 6-7-86); 141 v H 205, § 3. Eff 1-1-87.

§ 2744.02 [Classification of functions of political subdivisions; liability; exceptions.]

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

(a) A member of a municipal corporation police department or any other police agency was operating a

motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid operator's or chauffeur's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

HISTORY: 141 v H 176. Eff 11-20-85.

§ 2744.03 [Defenses or immunities of subdivision and employee.]

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the per-

formance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability, resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of his sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 [215.35.5] of the Revised Code, and if, at the time of his injury or death, the person or child was covered for purposes of Chapter

4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state, is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit

any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

HISTORY: 141 v H 176 (Eff 11-20-85); 141 v S 297. Eff 4-30-86.

§ 2744.04 [Statute of limitations; demand for judgment.]

(A) An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action arose, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state.

(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

HISTORY: 141 v H 176. Eff 11-20-85.

§ 2744.05 [Limitations on damages awarded.]

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded;

(B) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such benefits. Nothing in this division shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not

apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of such a person;

(b) All expenditures of the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on his behalf in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf in relation to the actual preparation or presentation of the person's claim;

(f) Any other expenditures of the person injured or whose property was injured or destroyed or of another

person on his behalf that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

HISTORY: 141 v H 176. Eff 11-20-85.

§ 2744.06 [Exemption from attachment; payment of judgments; annual installments.]

(A) Real or personal property, and moneys, accounts, deposits, or investments of a political subdivision are not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment rendered against a political subdivision in a civil action to recover damages for injury, death, or loss to persons or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. Such judgments shall be paid from funds of the political subdivisions that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget and annual appropriation measure and payment in the next succeeding fiscal year as provided by section

5705.08 of the Revised Code, unless any such judgment is to be paid from the proceeds of bonds issued pursuant to section 133.27 of the Revised Code or pursuant to annual installments authorized by division (B) or (C) of this section.

(B) (1) (a) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(i) All wages, salaries, or other compensation lost by the person injured as a result of the injury, as of the date of the judgment;

(ii) All expenditures of the person injured or of another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(iii) All expenditures of a person whose property was injured or destroyed or of another person on his behalf in order to repair or replace the property that was injured or destroyed;

(iv) All expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf in relation to the actual preparation or presentation of the person's claim;

(v) Any other expenditures of the person injured or of the person whose property was injured or destroyed or of another person on his behalf that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

(b) As used in this division, "the actual loss of the person who is awarded the damages" does not include any of the following:

(i) Wages, salaries, or other compensation lost by the person injured as a result of the injury, that are future expected earnings of such a person;

(ii) Expenditures to be incurred in the future, as determined by the court, by the person injured or by another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(iii) Any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss;

(iv) Any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

(2) Except as specifically provided to the contrary in this division, a court that renders a judgment against a political subdivision as described in division (A) of this section and that is not in favor of the state may authorize the political subdivision, upon the motion of the political subdivision, to pay the judgment or a specified portion of the judgment in annual installments over a period not to exceed ten years, subject to the payment of interest at the rate specified in section 1343.03 of the Revised Code. A court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that represents the actual loss of the person who is awarded the damages.

Additionally, a court shall not authorize the payment in installments under this division of any portion of a judg-

ment or entire judgment that does not represent the actual loss of the person who is awarded the damages unless the court, after balancing the interests of the political subdivision and of the person in whose favor the judgment was rendered, determines that installment payments would be appropriate under the circumstances and would not be unjust to the person in whose favor the judgment was rendered. If a court makes such a determination, it shall fix the amount of the installment payments in such a manner as to achieve for the person in whose favor the judgment was rendered, the same economic result over the period as he would have received if the judgment or portion of the judgment subject to the installment payments had been paid in a lump sum payment.

(C) At the option of a political subdivision, a judgment as described in division (A) of this section and that is rendered in favor of the state may be paid in equal annual installments over a period not to exceed ten years, without the payment of interest.

HISTORY: 141 v H 176. Eff 11-20-85.

§ 2744.07 [Defense and indemnification of employees; authority to settle.]

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended

by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.

(B)(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.

(2) No action or appeal of any kind shall be brought by any person, including any employee or a taxpayer, with respect to the decision of a political subdivision pursuant to division (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall be from funds appropriated for this purpose.

(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, the employee may file, in the court of common pleas of the county in which the political subdivision is located, an action seeking a determination as to the appropriateness of the refusal of the political subdivision to provide him with a defense under that division.

HISTORY: 141 v H 176. Eff 11-20-85.

§ 2744.08 [Liability insurance; self-insurance programs; waiver of immunity.]

(A)(1) A political subdivision may use public funds to secure insurance with respect to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The insurance may be at the limits, for the circumstances, and subject to the terms and conditions, that are determined by the political subdivision in its discretion.

The insurance may be for the period of time that is set forth in specifications for competitive bids or, when competitive bidding is not required, for the period of time that is mutually agreed upon by the political subdivision and insurance company. The period of time does not have to be, but can be, limited to the fiscal cycle under which the political subdivision is funded and operates.

(2)(a) Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, the political subdivision may establish and maintain a self-in-

surance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The political subdivision may reserve such funds as it deems appropriate in a special fund that may be established pursuant to an ordinance or resolution of the political subdivision and not subject to section 5705.12 of the Revised Code. The political subdivision may allocate the costs of insurance or a self-insurance program, or both, among the funds or accounts in the subdivision's treasury on the basis of relative exposure and loss experience. If it so chooses, the political subdivision may contract with any person, other political subdivision, or regional council of governments for purposes of the administration of such a program.

(b) Political subdivisions that have established self-insurance programs relative to their and their employees' potential liability as described in division (A) (2) (a) of this section may mutually agree that their self-insurance programs will be jointly administered in a specified manner.

(B) The purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees, except that the political subdivision may specifically waive any immunity or defense to which it or its employees may be entitled if a provision to that effect is specifically included in the policy of insurance or in a written plan of operation of the self-insurance program, or, if any, the legislative enactment of the political subdivision authorizing the purchase of the insurance or the establishment and maintenance of the self-insurance pro-

gram. Such a specific waiver shall be only to the extent of the insurance or self-insurance program coverage.

(C) The authorizations for political subdivisions to secure insurance and to establish and maintain self-insurance programs in this section are in addition to any other authority to secure insurance or to establish and maintain self-insurance programs that is granted pursuant to the Revised Code or the constitution of this state, and they are not in derogation of any other authorization.

HISTORY: 141 v H 176 (Eff 11-20-85); 141 v H 875. Eff 6-7-86.

[§ 2744.08.1] § 2744.081 [Joint self-insurance pools; risk-management programs.]

(A) Regardless of whether a political subdivision secures a policy or policies of liability insurance, or establishes and maintains a self-insurance program or enters into an agreement for the joint administration of a self-insurance program, under section 2744.08 of the Revised Code, the political subdivision may, pursuant to a written agreement, to the extent that it considers necessary, join with other political subdivisions in establishing and maintaining a joint self-insurance pool to provide for the payment of judgments, settlement of claims, expense, loss, and damage that arises, or is claimed to have arisen, from an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function and to indemnify or hold harmless the subdivision's employees against such loss or damage.

All of the following apply to a political subdivision joint self-insurance pool under this section:

(1) Such funds shall be reserved as are necessary, in the exercise of sound and prudent actuarial judgment,

to cover potential political subdivision and employee liability, expense, loss, and damage. A report of amounts so reversed and disbursements made from such funds, together with a written report of a member of the American academy of actuaries certifying whether the amounts reserved conform to the requirements of this division, are computed in accordance with accepted loss reserving standards, and are fairly stated in accordance with sound loss reserving principles, shall be submitted, on or before the last day of March for the preceding calendar year, to the superintendent of insurance for his approval. The superintendent shall review the report for the purpose of determining whether the reserves of the pool are adequate in accordance with reserve standards that would be applicable to a private insurance company writing the same coverages. The joint self-insurance pool shall pay the reasonable costs and expenses incurred in the review of the actuarial report or in any other investigation that the superintendent considers necessary. The superintendent may adopt any rules under Chapter 119. of the Revised Code that he considers appropriate for accomplishing the purpose of division (A)(1) of this section. The superintendent shall inform the reporting authority of this approval or disapproval of the report. In the case of a disapproval, the superintendent shall order the reporting authority to comply with this division within a reasonable period of time under the circumstances to be determined by the superintendent.

The report required by this division shall include, but not be limited to, disbursements made for the administration of the pool, including claims paid, costs of the legal representation of political subdivisions and employees, and fees paid to consultants.

(2) A contract may be awarded, without the necessity of competitive bidding, to any person, political subdivision, nonprofit corporation organized under Chapter 1702. of the Revised Code, or regional council of governments created under Chapter 167. of the Revised Code for purposes of administration of a joint political subdivision self-insurance pool. No such contract shall be entered into without full, prior, public disclosure of all terms and conditions. Such disclosure shall include, at a minimum, a statement listing all representations made in connection with any possible savings and losses resulting from such contract, and potential liability of any political subdivision or employee. The proposed contract and statement shall be disclosed and presented at a meeting of the political subdivision not less than one week prior to the meeting at which the political subdivision authorizes the contract.

(3) The pool shall include a contract with a member of the American academy of actuaries for the preparation of the written evaluation of the reserve funds required under division (A)(1) of this section.

(4) A joint insurance pool may allocate the costs of funding the pool among the funds or accounts in the treasuries of the political subdivisions on the basis of their relative exposure and loss experience.

(B) Two or more political subdivisions may also authorize the establishment and maintenance of a joint risk-management program, including but not limited to the employment of risk managers and consultants, for the purpose of preventing and reducing the risks covered by insurance, self-insurance, or joint self-insurance programs.

(C) A political subdivision is not liable under a joint self-insurance pool for any amount in excess of amounts payable pursuant to the written agreement for the par-

ticipation of the political subdivision in the joint self-insurance pool. Under a joint self-insurance pool agreement a political subdivision may, to the extent permitted under the written agreement, assume the risks of any other political subdivision, including the indemnification of its employees. A joint self-insurance pool, established under this section, is deemed a separate legal entity for the public purpose of enabling the members of the joint self-insurance pool to obtain insurance or to provide for a formalized, jointly administered self-insurance fund for its members. An entity created pursuant to this section is exempt from all state and local taxes.

Any political subdivision may issue general obligation bonds, or special obligation bonds which are not payable from real or personal property taxes, and may also issue notes in anticipation of such bonds, pursuant to an ordinance or resolution of its legislative authority or other governing body for the purpose of providing funds to pay judgments, losses, damages, and the expenses of litigation or settlement of claims, whether by way of a reserve or otherwise, and to pay the political subdivision's portion of the cost of establishing and maintaining a joint self-insurance pool or to provide for the reserve in the special fund authorized by division (A)(2)(a) of section 2744.08 of the Revised Code.

In its ordinance or resolution authorizing bonds or notes under this section, a political subdivision may elect to issue such bonds or notes under the procedures set forth in Chapter 133. of the Revised Code. In the event of such an election, notwithstanding Chapter 133. of the Revised Code, all of the following apply:

(1) The maturity of the bonds may be for any period authorized in the ordinance or resolution not exceeding

twenty years, which period shall be the maximum maturity of the bonds for purposes of section 133.32 of the Revised Code.

(2) The bonds may be payable in such principal installments as are authorized in the ordinance or resolution.

(3) The ordinance or resolution may provide for the sale of the bonds or notes through competitive or negotiated sale.

Bonds and notes issued under this section shall not be considered in calculating the net indebtedness of the political subdivision under sections 133.02, 133.03, 133.04, and 133.05 of the Revised Code. Sections 9.98 to 9.983 [9.98.3] of the Revised Code are hereby made applicable to bonds or notes authorized under this section.

(D)(1) A joint self-insurance pool, in addition to its powers to provide self-insurance against any and all liabilities under this chapter, may also include any one or more of the following forms of property or casualty self-insurance for the purpose of covering any other liabilities or risks of the members of the pool:

(a) Public general liability, professional liability, or employees liability;

(b) Individual or fleet motor vehicle or automobile liability and protection against other liability and loss associated with the ownership, maintenance, and use of motor vehicles;

(c) Aircraft liability and protection against other liability and loss associated with the ownership, maintenance, and use of aircraft;

(d) Fidelity, surety, and guarantee;

(e) Loss or damage to property and loss of use and occupancy of property by fire, lightning, hail, tempest, flood, earthquake, or snow, explosion, accident, or other risk;

(f) Marine, inland transportation and navigation, boiler, containers, pipes, engines, flywheels, elevators, and machinery;

(g) Environmental impairment;

(h) Loss or damage by any hazard upon any other risk to which political subdivisions are subject, which is not prohibited by statute or at common law from being the subject of casualty or property insurance.

(2) A joint self-insurance pool is not an insurance company. Its operation does not constitute doing an insurance business and is not subject to the insurance laws of this state.

(E) This section shall not be construed to effect the ability of any political subdivision to self-insure under the authority conferred by any other section of the Revised Code.

HISTORY: 141 v H 875. Eff 6-7-86.

§ 2744.09 [Actions and claims exempted from provisions.]

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his po-

litical subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

HISTORY: 141 v H 176. Eff 11-20-85.

LAKEWOOD CODIFIED ORDINANCE

Ordinance No. 1-87

By: Brown, Chinnock, Gallagher,
Graham, McBride, Salmon, Wendling

AN EMERGENCY ORDINANCE to reenact Section 901.181 of the Streets and Public Services Code of the Codified Ordinances of the City of Lakewood with the operation and effect of certain provisions therein held unconstitutional by the U.S. Sixth Circuit Court of Appeals suspended pending further appeals or exhaustion of time thereof as an interim measure to provide for the regulation of the installation of newspaper dispensing devices on the public property along the streets and thoroughfares within the City.

WHEREAS, the United States District Court for the Northern District of Ohio, Eastern Division held Sections 901.18 and 901.181 as presently constituted to be constitutional, but the U.S. Sixth Circuit Court of Appeals in *Plain Dealer Publishing Company vs. City of Lakewood*, Case Nos. 84-3683 and 84-3722, has held by opinion dated July 10, 1986, (rehearing *en banc* denied, September 25, 1986), that certain provisions of Section 901.181 as adopted by Ordinance No. 109-83 passed October 17, 1983, and amended by Ordinance 2-84, passed January 3, 1984, were unconstitutional in part, but otherwise held that remaining provisions of such Section to be constitutional but inoperable, and

WHEREAS, the aforesaid decision has been appealed by the City of Lakewood and this Council finds it necessary and appropriate to reenact Section 901.181 with certain provisions temporarily suspended or added and au-

thorizing the Mayor to issue rental permits under said Section pending exhaustion of any appeals by the City or its adversary, and

WHEREAS, this ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Section 901.181 of the Codified Ordinances of the City of Lakewood as adopted by Ordinance 109-83, passed October 17, 1983, and amended by Ordinance 2-84 passed January 3, 1984, be and the same is hereby reenacted and the Mayor is hereby authorized, empowered and directed to accept applications for placement for newspaper dispensing devices and issue rental permits to any applicant complying with all the provisions of said Section and as hereinafter provided for the placement of newsboxes on property of the City of Lakewood, except for the following provisions, the operation and effect of which is hereby temporarily suspended, to wit: (a) the provisions in the second paragraph of said Section 901.181 to the extent that it grants the Mayor any unbridled discretion to either grant or deny such licenses; (b) the provision of subparagraph 901.181(a), last sentence requiring that the design of such devices shall be subject to approval by the Architectural Board of Review; and (c) the provision of subparagraph 901.181(c)(5) requiring indemnification and liability insurance including the City as a named insured.

Provided further, however, that the Mayor shall not issue any such rental permit for placement of a newspaper dispensing device to be located in a handicap curb, ramp

or any other place where placement would cause any nuisance or health or safety hazard and all permits issued shall specify and be subject to the following additional conditions: (a) only newspaper dispensing devices colored bronze brown, the same color as required for other city streetscape facilities, may be installed; (b) no permanent rights shall be secured upon the granting of such rental permit by the applicant; and, (c) the City shall have the right to remove any newspaper dispensing device installed upon failure to timely renew the application or comply with any of the provisions of this Section or Section 901.181 of the Codified Ordinances after ten (10) days notice to the applicant to remove same or requiring compliance.

Section 2. The suspension and other provisions in Section 1 of this ordinance shall only remain in full force and effect pending the outcome of the City's aforementioned appeal and exhaustion of the time for any other appeal and/or rehearing and for a period of sixty (60) days thereafter, or until further act of Council.

Section 3. It is found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Section 4. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it

shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force after the earliest period allowed by law.

/s/ JOHN PATRICK GALLAGHER
President

Adopted: January 5, 1987

/s/ KAREN A. DOWLING
Clerk

/s/ ANTHONY C. SINAGRA
Mayor

Approved: January 6, 1987

REPLY BRIEF

No. 86-1042

Supreme Court, U.S.

FILED

OCT 23 1967

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,

Appellant.

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APPELLANT'S REPLY BRIEF

HENRY B. FISCHER, Counsel of Record

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER

& CHOCKLEY

1215 Terminal Tower

Cleveland, Ohio 44113

(216) 781-1212

WILLIAM E. ELACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

CITY OF LAKEWOOD

12650 Detroit Avenue

Lakewood, Ohio 44107

(216) 521-6580

Attorneys for Appellant

City of Lakewood

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I. STATEMENT OF FACTS

A. Newsboxes Permanently Occupy City Property

Contrary to Appellee's argument, newsboxes are not "semi-stationary newsboys". The District Court in its "Memorandum and Order", at "Findings of Fact", ¶ 19, held:

The placement of a newspaper dispensing device on property is normally of a permanent nature, the device generally occupying a specific portion of property for months or years.

Joint Appendix (hereinafter "J.A.") 218. The Plain Dealer has never objected to, or appealed from, this finding.

B. Newsboxes Create Safety Hazards

In addition to those safety hazards discussed at pp. 6-8 of "Appellant's Brief on the Merits", newsboxes create other safety hazards. As commented on in *Are These Streets For Walking?*, The Plain Dealer, July 3, 1987, at 12-A, cols. 1 and 2 (Addendum p. A1):

[T]wo years ago, Gregory Stokley of Bay Village suffered an electrical shock at Superior Ave. and E. 9th. A Cleveland Public Power foreman said bolts anchoring a USA Today newspaper box may have penetrated an underground CPP electrical line, which inclement weather probably caused to short out, electrically charging water on the sidewalk.

While the City Engineer and Police Captain testified that they did not foresee any difficulty with placing newsboxes at the proposed sites, they were only testifying in the context of complying with City ordinances or regulations. They did not testify that newsboxes were, *per se*, hazard free, as suggested by Appellee at p. 31 of its Brief.

C. Newsboxes Create Esthetic Hazards

In addition to the esthetic hazards discussed at pp. 8-9 of Appellant's Brief, it has come to the City's attention that the color and design of certain newsboxes are used to advertise the type of material they sell. For example, there is the recent phenomena of "hot pink" newsboxes which sell sexually explicit material (and have sex "hot-line" phone numbers emblazoned on their sides). Additionally, more "First Amendment protected material" is, apparently, going to be sold via vending machines (e.g., machines intended to vend videocassettes—See, description, *infra*).

D. Additional "First Amendment Protected Material" To Be Sold Via Vending Machines

In addition to newspapers and magazines, new technology in vending machines has afforded other material the opportunity to be sold in such a manner. As reported on in *The Plain Dealer*:

To Diebold, Inc., officials, the flashing lights atop the "marquee" of the company's new seven-foot tall video cassette vending Movie Machine are a sign of the bright prospects the machine is opening to the North Canton company.

Gerdel, *Diebold using ATM technology for video vending*, *The Plain Dealer*, July 27, 1987, at 9-C, col. 1 (Addendum A3). At this time, it is impossible to foresee all "First Amendment protected material" which will, in the future, be vended via mechanical devices.

II. ARGUMENT

A. The City May Prohibit Newsboxes From Being Erected On City Property

1. The Plain Dealer has no First Amendment right to exclusively use City property to sell its newspapers

As noted above, the District Court found—as dictated by common sense—that newsboxes permanently occupy City property for a period of months or years. As distribution is as protected as publication [*Lovell v. Griffin*, 303 U.S. 444 (1938)], it is instructive to inquire whether a newspaper may claim a First Amendment right to exclusively use City property for publication.

It is doubtful that even the Plain Dealer has the temerity to assert a purported First Amendment right to exclusively use portions of a city park (a traditional public forum) to erect a printing press. As stated in the Brief of Amicus Curiae, National League of Cities, et al.:

[N]o publisher would contend that a City is . . . obligated to reserve land in perpetuity for use in publishing. Plainly, the First Amendment does not require a City to lease city property to a publisher for a printing facility.

.

Moreover, there is no right to assistance from state and local governments in distributing newspapers. . . . Recognition of special rights for the press to occupy and use city property, . . . would impose affirmative obligations on state and local governments to assist in the distribution of newspapers. This the First Amendment does not require.

Id. at pp. 14-15. Additionally, under the copyright laws, the Plain Dealer has no First Amendment right to exclusively claim the published works of the City as its own for purposes of publication [*See, Nat. Conf. of Bar Ex-*

aminers v. Multi-State, 495 F. Supp. 34, 35 (N.D. Ill. 1980) (mod. on other grounds at 692 F.2d 478, cert. den. at 464 U.S. 814); and, *Bldg. Officials & Co. Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735-736 (1st Cir. 1980)]. Nevertheless, the Plain Dealer claims a First Amendment right to take portions of City sidewalks to erect mechanical devices to distribute its paper.

The Constitution creates no property rights. The Plain Dealer has no First Amendment right to exclusively use the real (or intellectual) property of the City for purposes of publication. Thus, the Plain Dealer has no First Amendment right to exclusively use City property for purposes of distribution. To paraphrase former Chief Justice Burger:

[Appellee's] attempt to [sell and advertise newspapers via newsboxes] is . . . conduct, not speech. Moreover, it is conduct that interferes with the rights of others to use [City sidewalks] for the purposes for which [they were] created. [City sidewalks] . . . are for all the people, and their rights are not to be trespassed even by those who have some "statement" to make. . .

It trivializes the First Amendment to seek to use it as a shield in the manner asserted here.

Clark v. Community for Creative Nonviolence, 468 U.S. 288, 300-301 (1984) (Burger, C.J., concurring).

2. The Plain Dealer claims a First Amendment property right in City property

Contrary to the Plain Dealer's argument, it does, indeed, seek a property interest in City property. Clearly, erecting a fixed structure on land is an occupation of that land [See, *Loretto v. Teleprompter Manhattan CTAV Corp.*, 458 U.S. 419, 437 (1982)]. It has long been rec-

ognized that a physical occupation of real property is the quintessential deprivation of a property owner's property rights: "Any invasion of property, . . . whether temporary or permanent, is a taking: . . ." J. Lewis, *A Treatise on the Law of Eminent Domain in the United States*, 197 (1888). Indeed, airplanes flying over a landowner's property may constitute a taking. *United States v. Clause*, 328 U.S. 256 (1946). Just as a taking does not depend on whether the structure occupying property is bigger than a bread box [*Loretto, supra*, at p. 437, n.16], a taking should not be dependent on how easily the structure can be moved. The fact remains that newsboxes are erected on City property and are left there for months or years, dispossessing the general public from the property they occupy.

The Plain Dealer cites *Ohio Valley Advertising Corp. v. Linzell*, 107 Ohio App. 351 (Franklin County Ct. 1957), for the proposition that the placement of signs on another's property creates no interest in the land. *Linzell* actually holds that an interest in property is created when a written instrument gives to a person the right of possession and exclusive occupation of land for all purposes not prohibited by the instrument's terms. *Id.* at 353-354. Pursuant to Lakewood Codified Ordinance, §901.181, the Plain Dealer, for an annual rental fee of \$10.00 per site, is given possession and exclusive occupation of City property for the retail sale and advertising of newspapers via mechanical dispensing machines. Section 901.181 clearly contemplates the rental of City property and provides for various conditions on renting City property [e.g., the rental term being for one year and the actual rental agreement not being assignable, §901.181(c)(6)].

Moreover, should the situation arise, the Plain Dealer will undoubtedly claim a property right. Under §901.181, there are certain locational and spacing requirements for

newsboxes. Thus, there may come a time when all newsbox locations at a desirable site will be taken. If a competing paper were then to come to the desirable site, find that there are no additional locations, and proceed to replace the Plain Dealer's newsbox with their own—moving the Plain Dealer's newsbox to a less desirable location—the Plain Dealer would certainly protest, claiming that with its \$10.00 rental fee, it had rented a specific portion of property at the desirable site.

Clearly, newsboxes permanently occupy City property pursuant to a written instrument that grants the newsbox owner a rental interest in City property.

3. The issue of a total prohibition of newsboxes on City property is properly before this Court

The Plain Dealer argues in its Brief that a total prohibition of newsboxes on City property is not an issue properly before this Court. Such is not the case.

Subsequent to the District Court granting the Plain Dealer's Motion for Summary Judgment, the City amended its original ordinance because it contained the undefined term "public ground". By amending its ordinance, the City did not capitulate on the issue of whether the Plain Dealer had a First Amendment right to take City property. Indeed, from the beginning of this case, by its ordinal enactments, pleadings and briefs, the City has maintained and acted consistently with the position that no property rights are created by the United States Constitution, and, therefore, the Plain Dealer has no First Amendment "right" to exclusively use City property.

The District Court, in its "Memorandum and Order", at "Conclusions of Law" ¶ 1-3, held:

1. No property rights to use the properties of others including the City of Lakewood are created or

granted by either the First or Fourteenth Amendments to the United States Constitution insuring to the benefit of the Plain Dealer. . .

2. The proposed placement of newsracks on City property is a "taking" of property. . .
3. The City of Lakewood has no obligation under the Constitution and laws of the United States or otherwise mandating that it permit the exclusive use of City of Lakewood real estate for private purposes, commercial or otherwise, to the exclusion of all other members of the public.

J.A. 220-221. Thus, the law of the case was that *there is no First Amendment right for newsboxes to be erected on City property and that the City was not obligated to allow newsboxes to be erected on its property*. These Conclusions of Law were not overturned. Although the Court of Appeals recognized that the City had a right to charge rent, it inconsistently concluded that there is a First Amendment right to sell newspapers via newsboxes (Jur. St. A8), and that it is one of the conclusions that the City disputes.

All other cases discussing a governmentally created property right begin their analysis with one basic premise: The constitution of the United States does not create property rights, "[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . .". *Board of Regents v. Roth*, 400 U.S. 564, 577 (1972) [see, also, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)]. As held in *Perry v. Sindermann*, 408 U.S. 593 (1972), there is no inherent "right" to a governmentally created property interest. *Id.* at 597. Thus, as the Plain Dealer is seeking a property interest that it has no inherent or constitutional right to, the City

may choose not to grant such an interest and prohibit newsboxes from being erected on City property.

B. A Total Prohibition Of Newsboxes On City Property Is Constitutional

1. The Plain Dealer erroneously substitutes "simplistic platitudes" for legal analysis

To paraphrase former Chief Justice Burger:

Relying on simplistic platitudes about content, subject matter and the dearth of other means to communicate, the [newspaper] industry attempts to escape the real and growing problems every municipality faces in protecting safety and preserving the environment in an urban area.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 555-556 (1981).

Ignoring this explicit warning, the Plain Dealer continually relies on cases that deal with: content regulations; total prohibitions; and, transient dissemination of material.¹ Relying on such cases necessarily leads to the application of erroneous standards to the City's ordinances. The problem with the Plain Dealer's reliance on "simplistic platitudes" is evidenced by its reliance on *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).² The Plain

1. All newsbox cases cited by the Plain Dealer are similarly flawed, for they are based on the erroneous conclusion that newsboxes equal newspapers and/or that newsboxes equal *Alma Lovell* [See, cases cited in Appellee's Brief at pp. 13-14, n.7]. A newsbox is no more a newspaper than a bookstore is a book. Moreover, a newsbox is not the same as *Alma Lovell*. As stated in the City's Brief on the Merits:

... *Alma Lovell* can peripatetically sell the "Golden Age" virtually regulation free. But, she cannot build a shanty on city sidewalks from which to sell the "Golden Age" without the city's permission.

Id. at 19.

2. The Plain Dealer also relies extensively on *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 55 U.S.L.W. 4855 (U.S. (Continued on following page)

Dealer cites *Schad*—wherein a municipality totally banned nude dancing—for the proposition that if a particular manner of expression is compatible with the normal use of public forum property, the City may not exclude the expression. Obviously, there are no parallels between a total prohibition of nude dancing and regulating the rental of City property for newsboxes.

In this case, the Plain Dealer's "expressive activity" of selling newspapers is, and can be, done in numerous ways. Newsboxes are only one manner of selling newspapers. Even if newsboxes were totally prohibited from being erected on City property, there would not be a "total prohibition" of selling newspapers. The Plain Dealer may sell its papers door-to-door, by mail, by single sales at stores, by newsboxes on private property,³ and by newsmen selling papers on public sidewalks.

Footnote continued—

June 15, 1987). In *Jews for Jesus*, the Los Angeles International Airport prohibited all protected expression and purported "to create a virtual 'First Amendment Free Zone' at LAX". *Id.* at 4856. The regulation at issue in *Jews for Jesus* bears no resemblance to the City's ordinance which merely regulates the rental of City property for newsboxes.

Furthermore, Appellee's preoccupation with censorship is totally unsupported and unwarranted by the facts, evidence and record of this case. The Mayor is, of course, elected by the people, based upon their trust and expectation, to exercise judgment in the public interest, which includes the administration of public property. Denial of a newsbox rental permit for health and safety reasons which are not arbitrary, capricious, unconstitutional, unreasonable or unsupported in fact has nothing to do with censorship. Judicial review of the denial is an additional guarantee against such censorship. Appellees have not, and cannot, demonstrate that any further limitations on the Mayor (or Architectural Review Board) will add to the full protections already provided in the ordinance and laws cited in the City's Brief.

3. In fact, a significant portion of the newsbox sales claimed by the Plain Dealer are not "street" sales, but are sales from newsboxes located on private property, such as motels, hotels, restaurants, supermarkets and gas stations.

2. The Holdings of City Council v. Taxpayers For Vincent, 466 U.S. 789 (1984) and City Of Los Angeles v. Preferred Communications, Inc., 476 U.S. _____, 90 L. Ed. 2d 480 (1986) are consistent with a total prohibition of newsboxes on City property

This Court, in *Vincent*, recognized that littering—i.e., leaving political signs and other First Amendment protected material on City property—can be prohibited while personal, transient distribution of literature cannot be prohibited:

The rationale of *Schneider* is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. . . . A distributor of leaflets has no right simply to scatter his pamphlets in the air. . . . One who is rightfully on a street open to the public "carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to communication of ideas by hand bills and literatures as well as by spoken word." . . . With respect to signs posted by Appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance on the landscape.

Id. at 809-810 (emphasis added). The Plain Dealer claims that since the signs were being posted on light poles (not a traditional public forum), then the *Vincent* holding does not apply to the instant matter. This is incorrect.

First, if the public forum non-public forum dichotomy was the distinguishing factor in *Vincent*, then one would

be led to the conclusion that the taxpayers for Vincent could "post" their signs on City sidewalks (a traditional public forum). As this Court held that "a distributor of leaflets has no right to scatter his pamphlets in the air", it is doubtful that the taxpayers for Vincent have the right to scatter their signs on the sidewalk.

Second, the ordinance at issue in *Vincent* included public sidewalks: "Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property." *Id.* at 791-792 (emphasis added).⁴ Clearly, the factor in *Vincent* which distinguished it from *Schneider* was not the fact that the signs were being posted on light poles. The distinguishing factor was that "speech" was left unattended on public property, just as the Plain Dealer is attempting to leave its newsboxes unattended on City property.

The holding in *Los Angeles v. Preferred Communications*, 476 U.S. _____, 90 L. Ed. 2d 480 (1986), is entirely consistent with the City's position in this case.⁵ The ques-

4. Section 28.04(a) specifically provided that: "No person shall . . . post, . . . any handbill or sign to or upon any sidewalk, . . ." *Id.* at 791, n.1 (emphasis added).

5. Three significant factual differences between the cases, however, should be noted. First, the property being used by Preferred Communications was not the City's, but was the property of two utilities, to wit: Pacific Telephone and Telegraph Co. and the Los Angeles Department of Water and Power [See *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1400 (9th Cir. 1985)]. Second, the State of California had dedicated the property sought by Preferred Communications for use by cable television companies. *Id.* at 1400. No such dedication of City property has been made in this case. Third, the City had already granted one cable license, and the question was whether the City could restrict cable franchisees to only one. In this case, there is no such limitation. As many newspapers or magazines as can be accommodated within the confines of Lakewood Codified Ordinance §901.181 will be allowed to rent City property for their newsboxes.

tion before this Court in *Preferred Communications* was whether, after the City had granted a cable TV license, it could, consistent with the First Amendment, grant only one cable license. This Court in remanding *Preferred Communications* for additional factual findings, held that regulating the exclusive use of others' property for communicative activities does not lend itself to being judged by "time, place and manner" analysis. The majority held:

Moreover, where speech and conduct are joined in single course of action, the First Amendment values must be balanced against competing societal interests.

Id. at 487-488 [See, also, concurring opinion of J. Blackmun, at 488].

Preferred Communication's holding that "First Amendment values must be balanced against competing societal interests" is exactly the standard the City proposes. As stated at p. 30 of the City's Brief, after a property right has been created by the City, it cannot be conditioned on unconstitutional grounds. To determine whether the condition is unconstitutional, this Court must balance:

The interest of the [Lessee] as a citizen, in commenting upon matters of public concern and the interest of the [City], as a [Lessor], in [providing essential public services for, and/or protecting the health, safety and welfare of, its residents and insuring that private use of City property does not interfere with public use of City property].

Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Thus, the holding of *Preferred Communications* is consistent with the City's position in this case.

3. Simply because utility poles and electric, telephone and cable TV wires are placed on City property does not mean that newsboxes have a First Amendment right to be placed on City property

The Plain Dealer relies on *Cater v. Northwestern Telephone Exchange Co.*, 63 N.W. 111 (Minn. 1895); *Smith v. Central Power Co.*, 103 Ohio St. 681 (1921); and, *Vernon v. Warner Amex Cable Communications, Inc.*, 25 Ohio St. 3d 117 (1986) (Douglas, J., concurring) for the dual principles that selling newspapers via newsboxes is not incompatible with the uses of Lakewood's sidewalks and First Amendment protection is not limited to peripatetic expression. Those cases, however, buttress the City's arguments that the City has extensive authority over its own property and that public utilities are different from newsboxes.

In *Cater*, the Court held that no structures could be put in the highway except by authority of the State, and then only for a public use. It recognized that "... [t]elephone lines must be placed in the highways. It is the only practical place to put them". *Cater v. Northwestern Telephone Exchange*, *supra*, at 114 (emphasis added). Similarly, in *Smith v. Central Power*, *supra*, the Court held that a municipality's authority over its streets, alleys and public places, is very comprehensive. The Court also recognized that the only "channel of communication" for electricity is utility poles and wires: "In order to have the convenience of electricity . . . , it is necessary that the electric energy should be transported by means of wires in the streets, alleys and public places." *Id.* at 690-691 (emphasis added). As pointed out in the City's Brief, unlike electricity and telephones, there are more than ample alternative channels of communication for the Plain Dealer to sell its newspapers. Finally, in *Vernon v. Warner Amex Cable Communications, Inc.*, *supra*, Justice Douglas

clearly sets forth the extensive authority a City has over its right-of-ways, and recognizes that a cable franchisee has no inherent right to use City property, but must be granted a license by a municipality. *Id.* at 122-124.

Thus, it is clear from the authority cited by the Plain Dealer that the City has extensive control over its property and can control what is erected on its property.⁶

4. Simply because newsboxes are cheaper than newspersons does not mean that the use of newsboxes is a First Amendment right

• The *only* rationale of the Plain Dealer and its *Amici* for using newsboxes instead of newspersons is that newsboxes are cheaper and more efficient. Simply because newsboxes may be cheaper and more profitable than newspersons does not transform their use into a First Amendment right:

Although the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry, . . . this solicitude has practical boundaries, see e.g., *Kovacs v. Cooper*, . . . (1949) ("That more people may be more easily and cheaply reached by sound trucks. . . is not enough to call forth constitutional protection for what those charged with public welfare reason-

6. There has never been a case wherein a court has held that a cable TV company had a First Amendment right to invade a city and exclusively use the city's property. Indeed, 47 U.S.C. §541, dealing with the granting of cable TV franchises, states at (a)(1): "A franchising authority may award, . . ." Thus, even though cable TV can only reach a city's residents through cable placed on city property, it can be prohibited from a city. Surely, a newsbox—only one manner of selling newspapers—can be prohibited from being placed on city property.

ably think is a nuisance when easy means of publicity are open"). See also, *Metromedia, Inc. v. San Diego*, . . . (Stevens, J., dissenting in part) (ban on graffiti constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression).

City Council v. Taxpayers For Vincent, *supra*, at 812, n.30.

C. The Ordinal Provisions At Issue In This Case Are Constitutional⁷

1. The City's requirement of insurance is constitutional

The potential dangers of placing newsboxes on City property were well documented at trial. Since trial, a Greater Cleveland resident was shocked because of the placement of a newsbox on City of Cleveland property. As stated by *Amicus Curiae*, National Institute of Municipal Law Officers, in its Brief:

[I]t is prudent risk management for cities to require insurance indemnification. With the disintegration of municipal immunity, cities, under the theory of joint and several liability, are perceived as "deep pocket" defendants.

Many insurance companies, faced with picking up the tab for this increased liability, are now either refusing to insure cities or insuring them at ridiculously high rates. To overcome this situation, mu-

7. Plain Dealer *Amicus*, the American Civil Liberties Union, argues at pp. 30-31, that §901.181 is unconstitutionally content based. This argument has never been raised before. Indeed, during the negotiations between the City and the Plain Dealer concerning the Amendment to §901.181, the Plain Dealer, never objected to the ordinance on the grounds that it was content based. Thus, this issue has not been presented by the parties and is not subject to review at this time. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. . . ., 89 L. Ed. 2d 823, 836, n.4 (1986).

municipalities must take steps, such as Lakewood has done here, to improve local government risk liability. *Id.* at pp. 6-7.

The Plain Dealer has already provided certificates of insurance to other cities covering its newsboxes, and the cities, in the amount of \$1,000,000.00 [ten times the amount required by §901.101(c)(5)]. Yet, the Plain Dealer complains it should not be required to provide insurance.

Simply because other items located on City property may not be required to have insurance⁸ does not mean that newsboxes are exempt. All items currently located on City property are owned by public utilities or political subdivisions of the State and provide essential public services or provide services directly related to the public health, safety and welfare. There are no "alternative channels" whereby these services can be provided to the City's residents. Newsboxes, however, are not similarly situated. They do not provide an essential public service, are not directly related to public health, safety and welfare, are not owned by public utilities or subdivisions of the State and there are more than adequate alternative channels by which the Plain Dealer can sell its newspaper.⁹

Thus, as the Plain Dealer's newsboxes are totally different from other items located on public property and the press is the only entity allowed access to City property for the erection of vending machines, the City may

8. Again, it should be noted that there is no evidence in the record of this case on this issue.

9. Plain Dealer Amicus, the American Civil Liberties Union, argues, at p. 47 of its Brief, that there are insufficient "alternative channels" for selling newspapers because the alternate sites are located on private, not public, property. This argument is

(Continued on following page)

require newsboxes to be insured [See, *Minneapolis Star v. Minnesota Comm. of Rev.*, 460 U.S. 575 (1983), wherein this Court held that where there is a special characteristic of the press, governmental entities may treat it differently].

2. The discretion of the Architectural Board of Review and the Mayor is Constitutional

a. This Court has specifically upheld "catch-all" provisions giving broad discretion to public officials to deny and/or terminate governmentally created property rights

The discretion given the Mayor in §901.181(c)(7) is merely a catchall provision meant to protect the City and its residents from any unforeseen circumstances when the actual rental agreements for newsboxes are drawn up.¹⁰ In the context of other governmentally created property rights, this Court is specifically upheld "catch-all" provisions for terminating those rights. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), Kennedy was discharged because of the content of his speech. He was discharged under a provision of the Lloyd-La Follette Act which authorized removal "for such cause as will promote the efficiency of the service". *Id.* at 158. This Court held that such a "catchall" phrase was not so vague or overbroad as to render the provision unconstitutional:

Footnote continued—

patently wrong. Newspersons use the City's streets and sidewalks on a daily basis to transport and sell newspapers in the same manner as, and to a greater extent than, other vendors and suppliers. Indeed, newspersons can sell newspapers on the very portions of City property now in dispute concerning newsboxes. Thus, every inch of the City's "public" sidewalks can be, and are being, used for selling newspapers.

10. For example, there must be a provision in the rental agreement that would allow the City to move newsboxes from their rented locations for safety purposes or if the sidewalk they were erected on needed to be replaced.

Because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for "cause," we conclude that the act describes, as explicitly as required, the employee conduct which is ground for removal. . .

"[I]t is not feasible or necessary for the government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes which define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecom[ing].'"

Id. at 161 [See also, *CSC v. Letter Carriers*, 413 U.S. 548, 580 (1973)]. In this case, it is just as infeasible and unnecessary for the City to spell out in detail all prohibited hazards that are, or will be, caused by newsboxes. Thus, the City may employ catchall provisions for terminating and/or denying the property right it has created.¹¹

b. *The Mayor's discretion must be read in conjunction with the entire ordinance, and the Architectural Board of Review's discretion must be read in conjunction with its authority*

11. As to the Architectural Review Board's discretion, as stated by *Amicus Curiae*, National Institute of Municipal Law Officers, in its Brief:

The problems presented by our rapidly changing society have called for the use of general standards to fulfill valid police power objectives. Two such objectives are aesthetics and safety. City councils do not have to set forth a completely comprehensive list of standards to determine all design questions or all possible safety hazards in order to enact a valid aesthetic ordinance. NIMLO's library of city codes contains several examples of such local ordinances by which governments have solved design and safety problems by creating architectural or design review boards.

Id. at pp. 12-13.

In interpreting §901.181, this Court must look to the entire ordinance and other relevant ordinances to give it meaning:

The general words used in the clause. . . , taken by themselves, and literally construed without regard to the objective in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlighten tribunal - because it is evident that in many cases it would defeat the object which the legislature intended to accomplish. . . [I]n interpreting a statute, the court will not look merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law as indicated by various provisions, and give to it such a construction that will carry into execution the will of the legislature, . . .

Brown v. Duchesne, 19 How. 183, 15 L. Ed. 595, 599 (1857) (emphasis added) [See, also, *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)]. Thus, when analyzing the Mayor's and Architectural Board of Review's discretion, the Court must put their discretion into context.

As to the Mayor, the context is an intent to limit his discretion to insuring that the placement of newsboxes on City property does not interfere with public use of City property and does not jeopardize the health, safety and welfare of the City's residents. This intent was offered at trial, and, is also set forth in §901.181(b). As to the discretion of the Architectural Review Board, its limits are found in §1325.03 of Lakewood's Codified Ordinances [See, "Appellant's Brief on the Merits", at p. 12]. Clearly, when read in context, neither the Mayor's nor

the Architectural Board of Review's discretion is unbridled or limitless.

3. The basic principles of *Greer v. Spock*, 424 U.S. 828 (1986) apply to this case

In *Greer v. Spock*, *supra*, the base Commander had the authority to prohibit the circulation of materials which he believed constituted "a clear danger to loyalty, discipline, or morale". This Court would not review a charge that the Commander's discretion was limitless because *Spock* had not applied for a permit to circulate materials on the military base.

The reason that the Commander's discretion would not be reviewed until it had been applied was that there was no First Amendment right to come on to a military base and circulate material. So it is in this case. There is no First Amendment right to exclusively use City property for a period of months or years to sell newspapers. Therefore, under the holding of *Greer v. Spock*, *supra*, the discretion of the Mayor and the Architectural Board of Review may not be reviewed until after that discretion has been applied.

III. CONCLUSION

For all of the foregoing reasons, the City requests the Court to hold that: (1) No person has a Constitutional right to erect structures on City property for any purpose; (2) The three ordinal provisions overturned by the Sixth Circuit Court of Appeals are valid and constitutional regulations of City property being rented for the installation of newsboxes; (3) Because of the nature, value, abuse and danger of newsboxes, they may be totally prohibited from being erected and affixed on City property; and (4) The City be awarded the costs of the within action.

Respectfully submitted,

HENRY B. FISCHER, *Counsel of Record*

JOHN H. GIBBON

FREDERICK W. WHATLEY

WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY

1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

WILLIAM E. BLACKIE

Law Director

ROGER D. TIBBETTS

Assistant Law Director

CITY OF LAKEWOOD
12650 Detroit Avenue
Lakewood, Ohio 44107
(216) 521-6580

*Attorneys for Appellant
City of Lakewood*

ADDENDUM

**Are These Streets For Walking?, The Plain Dealer,
July 3, 1987, at 12-A, cols. 1 and 2**

ARE THESE STREETS FOR WALKING?

Some simple things in life, like walking safely on a sidewalk, should be taken for granted. But don't be so sure. Within the last four years two Cleveland pedestrians have been electrocuted while walking along downtown streets.

The second incident occurred Monday, after Robert Risberg of Lakewood had attended an Indians baseball game. Risberg died while strolling to a bus shelter on Lakeside Ave., where he stepped on the metal cover of a Regional Transit Authority power box imbedded in the sidewalk. Cleveland Public Power technicians said a rusty RTA transformer, which was arcing electricity when they opened the cover, appeared to cause the problem. J. Barry Barker, RTA assistant general manager, said an electrical box in the bus shelter wasn't supposed to have power going to it. When the authority eliminated lighting at downtown bus shelters several years ago, the electrical service was to have been disconnected. Had RTA inspected the shelter, it would have found otherwise.

Risberg's wasn't the first such fatality. In January 1983, Raymond Kujawa died when he stepped on a Cleveland Public Power manhole cover while crossing Prospect Ave. near E. 9th St. City officials said the electrocution was caused by contact between the metal housing of the cover and a wire that was part of the municipal power plant street-lighting system.

And two years ago, Gregory Stokley of Bay Village suffered an electrical shock at Superior Ave. and E. 9th. A Cleveland Public Power foreman said bolts anchoring a USA Today newspaper box may have penetrated an underground CPP electrical line, which inclement weather probably caused to short out, electrically charging water on the sidewalk. Stokley, who said he was about three feet away from the dispensing machine when shocked, was hospitalized.

It doesn't take an electrical engineer to know that something is amiss here. The National Electric Safety Code requires utility companies to de-energize circuits that are abandoned, and to maintain regular equipment inspections for safety. That code isn't followed well enough.

While such hazards exist in all cities, three incidents in four years is three too many for Cleveland. City officials, Cleveland Public Power, the Cleveland Electric Illuminating Co., RTA and other agencies owe Greater Clevelanders a reassessment of their inspection practices so people can, indeed, feel secure in the notion that they can walk over a manhole cover without getting shocked, or worse, electrocuted.

Diebold using ATM technology for video vending, The Plain Dealer, July 27, 1987, at 9-C, col. 1

**DIEBOLD USING ATM TECHNOLOGY
FOR VIDEO VENDING**

By THOMAS W. GERDEL
Staff writer

To Diebold Inc. officials, the flashing lights atop the "marquee" of the company's new 7-foot-tall videocassette vending Movie Machine are a sign of the bright prospects the machine is opening to the North Canton company.

But to some on Wall Street, the flashing lights are a caution sign hanging over the company's stock.

The machine, developed by Diebold engineers from the company's successful automatic teller machine (ATM) technology, can dispense up to 374 videocassette movies automatically with use of a credit card.

If the video machine is marketed successfully, it could lead to vending of paperback books, audio cassettes and a host of other products employing Diebold's technology, which uses a computer-controlled robotic arm to pick up and store the cassettes.

But Diebold faces an already crowded video market and competition from other machine manufacturers including International Video Systems Inc. of Los Angeles.

Revco D.S. Inc. just began testing International Video's machines in five of its Greater Cleveland facilities, including the downtown store at 840 Euclid Ave. and stores in Chardon, Bedford, University Heights and Hudson.

A Revco spokesman said each machine could hold up to 350 videocassettes. If the test works here, Revco could expand the Movie Marquee machine to more of its nearly 2,000 stores, the spokesman said.

Diebold's hopes for its Movie Machine were riding high last fall when the first unit was introduced by Group 1 Entertainment, a Beverly Hills, Calif., company that planned to install 5,400 of the machines.

Group 1, headed by Hollywood movie promoter Brandon Chase, announced last October it had placed a \$36 million order with Diebold for 2,000 machines. This month's issue of Video Store magazine said Chase planned to have 3,000 machines operating by the year end.

Early last week, however, Chase and Group 1 dropped out of the picture when Diebold announced it had acquired from Group 1 all the marketing rights for the Movie Machine and intended to market the machine on its own.

So far, only about 100 of the 447 Movie Machines built by Diebold have been installed, although the company has geared up two plants, including one in Newark, O., to produce up to 500 machines a month.

The Group 1 buyout surprised investors and analysts, and Diebold's stock took a tumble, but then partially recovered. It closed Friday at \$53.50, down \$1.75 for the week.

"A lot of people (investors) are really unhappy about it," said William W. Baker, a senior vice president of McDonald & Co. Securities investment firm here.

Baker said McDonald removed its "buy" recommendation on Diebold last Monday because of the uncertainties.

He said the collapse of the Group 1 deal cast doubts on the judgment of Diebold management. Others wondered about the ability of Diebold, which traditionally has served the conservative banking industry with its safes, vaults and later its ATMs, to succeed in the fast-paced, already overcrowded video market.

There are more than 100,000 video rental and sales outlets nationally, including 25,000 video specialty stores. In some neighborhoods, "Mom and Pop" video stores compete with convenience stores, supermarkets and even restaurants.

Robert W. Mahoney, president and chief executive officer of Diebold, spent some time on the telephone last week reassuring securities analysts.

"They did not understand," Mahoney said in an interview in Diebold's offices last Thursday.

Mahoney said Diebold actually had booked orders for only 950 machines and had received a down payment from Group 1. However, additional payments lagged.

"They (Group 1) ran out of money," said Mahoney. "To avoid a costly legal situation, we acquired their assets," he added.

Mahoney said the Group 1 move would not affect Diebold's third-quarter results, and he expects strong results for the rest of this year.

Diebold recently reported an 8% rise in second-quarter earnings to \$8.1 million, against \$7.6 million a year earlier. For the first six months, earnings fell to \$14.7 million from \$17.7 million a year ago.

Mahoney said the video vending machine market was expected to grow to an estimated 50,000 in the next five years. Similar growth is seen for the market outside the United States, he said.

Diebold expects to become as dominant in this new market as it is in the ATM market, where it has an estimated 48% share. The North Canton company also makes electronic payment- and credit-authorization terminals for

retailers, automated gas pumping systems for service stations and other systems.

Mahoney said Diebold plans to market its Movie Machine to large convenience-store chains and mass merchandisers, hotels, motels, office buildings, hospitals and some video stores. He said video stores could offer the machine as a 24-hour service.

Because of their limited storage, the machines are expected to feature only the best-selling videos.

Mahoney said the machines would be installed in convenient locations, a building lobby, for example, where office workers could pick up a video on the way home after work, or in a hotel lobby.

Raymond M. Kirkpatrick, vice president of corporate planning for Diebold, said the company has seen an increase in impulse buying from its first installations.

Kirkpatrick said Diebold plans to contract video selection to videocassette management companies. But Diebold's own sales and service organizations will install and service the machines.

Some analysts are skeptical that Diebold can expand into the market that fast.

Videocassette sales, which are expected to total about \$5 billion this year, have grown rapidly the last two years. But the industry expects sales to level off soon at \$6 billion to \$7 billion annually, said David Shaw, editor of Entertainment Merchandising magazine in New York.

However, Shaw sees the new vending machine as an addition to the video market.

"If it can overcome the technical problems, it will help the market expand," he said.

Diebold officials are counting on the company's proven ATM reliability and its experience in security to give it an edge over competitors.

Kirkpatrick said "tapes can't disappear" under the machine's security system.

SUPPLEMENTAL BRIEF

12
No. 86-1042

Supreme Court, U.S.
FILED

NOV 2 1987

In the Supreme Court of the United States

JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**APPELLEE'S SUPPLEMENTAL BRIEF
ON THE MERITS**

JAMES P. GARNER, *Counsel of Record*

KAREN B. NEWBORN

DAVID L. MARBURGER

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

BRUCE W. SANFORD

BAKER & HOSTETLER

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 861-1500

PETER C. GOULD

BARRY N. STEINER

SABIN, BERMANT & BLAU

350 Madison Avenue

New York, New York 10017

(212) 692-4400

*Attorneys for Appellee Plain
Dealer Publishing Company*

No. 86-1042

In the Supreme Court of the United States

October Term, 1986

CITY OF LAKEWOOD,
Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**APPELLEE'S SUPPLEMENTAL BRIEF
ON THE MERITS**

Pursuant to Rule 35.5 of the Supreme Court Rules of Practice, Appellee Plain Dealer Publishing Company ("the Plain Dealer") submits this supplemental brief to bring to this Court's attention a recent decision which supports the Plain Dealer's position in this appeal.

On July 24, 1987, after the Plain Dealer filed its brief in chief, the Vermont Supreme Court decided *City of Burlington v. New York Times Co.*, No. 86-014, unreported. (The text of the decision is reprinted in the addendum to this supplemental brief.) In that case, the Vermont Supreme Court invalidated on First Amendment grounds a local ordinance that required newspaper publishers to obtain a permit before placing newsracks at appropriate locations along public ways. The ordinance provided that "It shall be unlawful for any person, firm or corporation to temporarily obstruct a street or sidewalk without first

obtaining a written permit therefor from the superintendent of streets"

Applying this Court's precedents and the decisions of state and federal courts involving newsracks, the Vermont Supreme Court invalidated the permit ordinance because it would subject newspaper publishers "to direct licensure at the unfettered discretion of a city official." Thus, this recent decision by the Vermont Supreme Court is evidence in addition to the many other newsrack cases cited in the Plain Dealer's brief in chief that the Sixth Circuit ruled correctly in applying First Amendment principles to local laws licensing and regulating newsracks.

Respectfully submitted,

JAMES P. GARNER, *Counsel of Record*

KAREN B. NEWBORN

DAVID L. MARBURGER

BAKER & HOSTETLER

3200 National City Center

Cleveland, Ohio 44114

(216) 621-0200

BRUCE W. SANFORD

BAKER & HOSTETLER

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 861-1500

PETER C. GOULD

BARRY N. STEINER

SABIN, BERMANT & BLAU

350 Madison Avenue

New York, New York 10017

(212) 692-4400

Attorneys for Appellee Plain

Dealer Publishing Company

ADDENDUM

JOURNAL ENTRY OF VERMONT SUPREME COURT IN CITY OF BURLINGTON v. NEW YORK TIMES COMPANY

(Filed July 24, 1987)

No. 86-014

VERMONT SUPREME COURT

October Term, 1986

CITY OF BURLINGTON,

v.

NEW YORK TIMES COMPANY,

APPEALED FROM: District Court of Vermont

Unit No. 2, Chittenden Circuit

Docket No. 696-12-84CnC

ENTRY ORDER

In the above entitled cause the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ FREDERIC W. ALLEN

Chief Justice

Concurring:

/s/ WILLIAM C. HILL

Associate Justice

/s/ LOUIS P. PECK

Associate Justice

/s/ ERNEST W. GIBSON, III

Associate Justice

**OPINION OF THE VERMONT SUPREME COURT
IN CITY OF BURLINGTON v. NEW YORK
TIMES COMPANY**

(Filed July 24, 1987)

No. 86-014

VERMONT SUPREME COURT
October Term, 1986

CITY OF BURLINGTON,

v.

NEW YORK TIMES COMPANY,

On Appeal from District Court of Vermont
Unit No. 2, Chittenden Circuit

John P. Connarn, J.

John L. Franco, Assistant City Attorney, Burlington, for
plaintiff-appellant

William B. Gray and John H. Fitzhugh of Sheehey, Brue
& Gray, Burlington, and Kenneth A. Richieri, The New
York Times Co., New York, New York, for defendant-
appellee

PRESENT: Allen, C.J., Hill, Peck, Gibson and Hayes,* JJ.

ALLEN, C.J. The City of Burlington appeals from the
grant of a motion to dismiss an action brought by the City
to collect a \$5.00 per week fee to place newspaper vending
machines on city sidewalks. The trial court declared the

*Justice Hayes was present for oral argument but did not
participate in this decision.

ordinance unconstitutionally overbroad and void for vague-
ness in violation of the First Amendment. We affirm.

In August, 1984, the New York Times Company (Times)
placed seven automatic coin-operated newspaper vending
machines along public streets in Burlington. Shortly
thereafter, the Times was informed by City officials that
the placement violated § 27-31 of the Burlington Code of
Ordinances, which reads as follows:

(a) It shall be unlawful for any person, firm or
corporation to temporarily obstruct a street or side-
walk without first obtaining a written permit therefor
from the superintendent of streets, except as herein-
after provided.

Within the Church Street Marketplace District
on any portion of Church Street, College Street, Bank
Street, or Cherry Street used for vehicular traffic,
the superintendent of streets shall not issue a permit
until the Administrator of the Church Street Market-
place District Commission approves of such obstruc-
tion. In the inner two (2) pedestrian blocks of the
marketplace district, the marketplace district commis-
sion administrator shall have exclusive jurisdiction
to issue permits.

(b) "Obstruction" as used in this section in-
cludes, but is not limited to, temporary obstacles and/
or barriers which hinder the free and safe passage
of pedestrians and vehicles, or which may receive
injury or damage, if run over or into by pedestrian
or vehicle traffic.

On December 21, 1984, the City brought a civil action
against the Times seeking a \$5.00 per week per machine

fee under the ordinance.¹ Defendant filed a motion to dismiss, arguing that the ordinance was unconstitutionally void for vagueness and overbroad under the First Amendment to the United States Constitution. Defendant contended that the requirement of a permit and a fee was an unconstitutional prior restraint on the dissemination of news, and improperly vested the power to grant or deny a permit in the unchecked discretion of the Superintendent of Streets and the Administrator of the Marketplace, without adequate guidelines or standards for decision. Defendant also argued that the ordinance did not contain adequate procedural due process protections for review of a permit denial, relying on the First, Fifth, and Fourteenth Amendments to the United States Constitution.

At hearing, the trial court agreed with defendant and granted its motion to dismiss on grounds that the ordinance was unconstitutionally overbroad and void for vagueness.

Freedom of speech and freedom of the press are protected by the First Amendment from infringement by Congress, and are among those fundamental rights protected from state action by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The First Amendment protects both publication and distribution of newspapers. *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). "Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little

1. Section 27-32 of the Burlington Code of Ordinances provides in pertinent part:

(b) The fee for a permit for a week or part thereof shall be five dollars (\$5.00).

value." *Id.* at 452 (quoting *Ex Parte Jackson*, 96 U.S. 727, 733 (1877)).

First Amendment protection for publication and distribution of newspapers does not, however, exempt newspapers from all forms of regulation. Time, place, and manner restrictions are permissible as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 176-78 (1983) (quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). When dealing with a public forum, such as the sidewalks upon which the Times placed its vending machines, the ability to permissibly restrict expressive conduct is limited. *Grace*, 461 U.S. at 177, 179. See also *Perry Education Assn.*, 460 U.S. at 45-46 (1983) (extent to which government can control access depends on nature of public forum). "In order to qualify as narrowly tailored, a content-neutral ordinance must avoid vesting city officials with discretion to grant or deny licenses" *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984). See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53 (1969) ("ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.* at 151 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958))). Arbitrary discretion vested in governmental authority is inherently inconsistent with a valid time, place and manner regulation because such discretion could potentially suppress particular

points of view by discriminating against licensees on the basis of what the licensee intends to say. *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

These First Amendment protections apply with equal force to newsracks on public sidewalks. *Miami Herald*, 734 F.2d at 673; *Gannett Satellite Information Network, Inc. v. Town of Norwood*, 579 F. Supp. 108, 114 (D. Mass. 1984); *Miller Newspapers, Inc. v. City of Keene*, 546 F. Supp. 831, 833-34 (D.N.H. 1982); *Southern New Jersey Newspapers, Inc. v. State of New Jersey Department of Transportation*, 542 F. Supp. 173, 182-83 (D.N.J. 1982). In *Gannett Satellite*, the town of Norwood relied on its general bylaws, prohibiting use of the town's streets and public ways for advertising or selling merchandise, to regulate newsracks:

No person shall, without the authority of the Board of Selectmen, place, paint or affix any sign, picture, political poster or advertising material of any kind upon any post, tree, sign, rock or other fixed place or object within the limits of any public way in the Town.

579 F. Supp. at 111 (emphasis added). Language at the root of the constitutional argument in the Norwood ordinance, "without the authority of the Board of Selectmen," is similar to that found in the Burlington ordinance, "without first obtaining a written permit therefor from the Superintendent of Streets"

The court in *Gannett Satellite* concluded that the bylaws relied upon by the town were unconstitutional because they were not narrowly drawn to regulate newsracks nor did they contain definite standards limiting the dis-

cretion of town officials. 579 F. Supp. at 115. The Burlington ordinance, similarly, is not narrowly drawn nor does it define standards any clearer or more definite than those condemned in *Gannett Satellite*. Burlington's ordinance leaves the task of setting standards entirely within the discretion of the Superintendent of Streets or the Administrator of the Church Street Marketplace District Commission. "When a city allows an official to [ban a means of communication] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Miller Newspapers*, 546 F. Supp. at 835 (quoting *Saia v. People of the State of New York*, 334 U.S. 558, 562 (1948)). The City may well have legitimate concerns about placing obstructions in the public rights-of-way that might impede its use, result in undue risk of harm to passersby, or create undue congestion or inconvenience. Such concerns are not beyond the power of the City to address in a narrowly drawn ordinance in a reasonable and administrable manner. See, e.g., *Philadelphia Newspapers, Inc. v. Borough Council, Mayor, Manager and Director of Public Works of Borough of Swarthmore*, 381 F. Supp. 228, 242-44 (E.D. Pa. 1974).

The City argues that the trial court erred by applying the facial overbreadth doctrine. It contends that the doctrine should not be invoked when a limiting construction can be placed on the challenged ordinance, relying on *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Broadrick* involved a challenge to state law proscribing political activity by state employees. The Supreme Court held that the challenged statute was constitutional, that any potential overbreadth could be cured through case-by-case application, and stressed the importance of a "limiting construction" on potentially overbroad language. *Id.* at 613-16.

The message of *Broadrick* is not applicable to the present case. The statute in *Broadrick* gave adequate warnings of what activities were proscribed and set out explicit standards for those who were to apply it. *Id.* at 607. The Burlington Code of Ordinance sections under review accomplish neither. Furthermore, facial overbreadth claims have been entertained where statutes purporting to regulate the time, place, and manner of expressive conduct require official approval under laws that delegate standardless discretion to local officials. *Id.* at 612-13. The City here seeks to enforce its ordinance through "an order abating further unlawful obstruction of the street." As such, enforcement of the ordinance would directly affect the exercise of First Amendment rights by defendant. The assertion of First Amendment rights by a newspaper is not, as the City maintains, the assertion of a vicarious right of its readers. It is the assertion of a fundamental personal right. See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). If upheld, the City's ordinance would subject defendant to direct licensure at the unfettered discretion of a city official. Under these circumstances, no "limiting construction" is possible. *Broadrick*, 413 U.S. at 613.

If an enactment has the practical effect of limiting free expression, it must be narrowly drawn. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 70-71, 75 (1981). The argument that the ordinance "places no restrictions whatever on the time, place, manner or number of news-racks which are to be displayed by the Times" is without merit. The ordinance leaves the City authorities with unlimited discretion to grant or refuse a permit and places those subject to the ordinance in the position of having to contend with the City on a case-by-case basis, without

the benefit of standards or guidelines. This the City may not do.

The City next argues that even if the ordinance is facially overbroad, it is rendered reasonable when read together with overriding state law. *Rutland Cable T.V., Inc. v. City of Rutland*, 122 Vt. 162, 165, 166 A.2d 191, 193 (1960). The City does not, however, indicate which "well established principles of Vermont municipal law" are to be read into its ordinance to narrow and save it. Furthermore, we are unaware of specific legal principles that fit plaintiff's description. All municipal ordinances in Vermont are limited by governing statutory enactments. *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 485-86, 380 A.2d 64, 66 (1977). Plaintiff's argument is based, not on the language of its ordinance, but rather on an unsupported assertion that the City intended its enactment to incorporate unspecified statutory law.

Plaintiff finally argues that even if the permit provision of its ordinance should be struck down because of vagueness and overbreadth, the fee provision ought to be severed and declared valid. This Court will, in an appropriate case, sever invalid portions of an enactment, leaving valid portions in full force. See *Bagley v. Vermont Department of Taxes*, 146 Vt. 120, 125-26, 500 A.2d 223, 226 (1985). However, only those portions of a statute or ordinance which fully operate as law apart from the portion declared invalid may be severed. *State v. Scampini*, 77 Vt. 92, 121-22, 59 A. 201, 211 (1904). In the present case, the fee provision of the ordinance, § 27-32, relates directly to a permit program which we have concluded is standardless and which confers excessively broad authority on City officials. The fee provision

and the invalid permit program are integrally related. The fee provision of § 27-32 is not severable and must fall with the permit program to which it is tied.

Because §§ 27-31 and 27-32 are invalid enactments under the First Amendment, it is unnecessary to address plaintiff's argument concerning the validity of fees or taxes that affect First Amendment freedom of the press.

Affirmed.

FOR THE COURT:

/s/ FREDERIC W. ALLEN
Chief Justice

AMICUS CURIAE

BRIEF

MAY 15 1987

JOSEPH F. SPANIOLO, JR.

CLERK

No. 86-1042

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAKEWOOD,

v.

Appellant,

PLAIN DEALER PUBLISHING CO.,

Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES,
COUNCIL OF STATE GOVERNMENTS,
UNITED STATES CONFERENCE OF MAYORS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
AND NATIONAL ASSOCIATION OF COUNTIES
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

PETER BUSCEMI

JOSEPH BROOKS

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Of Counsel

BENNA RUTH SOLOMON *

Chief Counsel

JOYCE HOLMES BENJAMIN

BEATE BLOCH

STATE AND LOCAL

LEGAL CENTER

444 North Capitol St., N.W.
Suite 349

Washington, D.C. 20001

(202) 638-1445

* *Counsel of Record for the
Amici Curiae*

QUESTIONS PRESENTED

1. Whether the First Amendment creates a right to place coin-operated newspaper vending machines on public property.
2. Whether the City of Lakewood's regulation of coin-operated newspaper vending machines is facially invalid under the First Amendment for any of the following reasons:
 - (a) because it authorizes the Mayor to prescribe "terms and conditions deemed necessary and reasonable" for the issuance of rental permits allowing the installation of such machines on public property;
 - (b) because it subjects the design of such machines to approval by the City's Architectural Board of Review; or
 - (c) because it conditions the issuance of rental permits for such machines on the permittee's furnishing liability insurance to hold the City harmless from claims of personal injury or property damage arising from the installation and operation of the machines.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1042

CITY OF LAKEWOOD,

Appellant,

v.

PLAIN DEALER PUBLISHING CO.,

*Appellee.*On Appeal from the United States Court of Appeals
for the Sixth CircuitBRIEF OF THE NATIONAL LEAGUE OF CITIES,
COUNCIL OF STATE GOVERNMENTS,
UNITED STATES CONFERENCE OF MAYORS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
AND NATIONAL ASSOCIATION OF COUNTIES
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTINTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments. Cases like the present one, which involves the alleged right of a private party to effect a

permanent physical occupation of public property, threaten the ability of *amici*'s members to regulate the use of their property in the public interest.

This case is another example of the ingenuity of counsel in fashioning constitutional challenges to a municipality's ordinary exercise of its police power. The fundamental question presented is whether the First Amendment imposes any obligation at all upon a City to permit the permanent installation of coin-operated newspaper vending machines on the City's property. More narrowly, the question is whether a City constitutionally may decide to allow the installation of such machines only on compliance with conditions designed to protect and promote the substantial interests of its citizenry.

Amici are concerned that the sweeping scope attributed by the decision below to the coverage of the First Amendment may subject to heightened scrutiny countless state laws and local regulations that may have an incidental impact on non-speech activity of businesses with First Amendment attributes. The reasoning of the court of appeals could call into question numerous routine non-discriminatory municipal ordinances, such as regulations of the location and hours of operation of various business establishments (because they may apply to businesses engaged in expressive activity); traffic regulations (because they may affect newspaper delivery routes); or even fire regulations restricting the number of persons permitted inside a building (because they may limit attendance at a political gathering).

Preservation of our fundamental liberties does not require that the press have unrestricted license to use public property for non-speech activity in derogation of reasonable regulations enacted to protect important governmental interests. The power of state and local governments to preserve the property under their control for the uses to which it has been lawfully dedicated is well

established. Because this Court's decision will have a direct and substantial impact on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.¹

STATEMENT OF THE CASE

Appellant City of Lakewood ("Lakewood") is a residential community located in Cuyahoga County, Ohio, west of the City of Cleveland. In 1980, the population of Lakewood was 61,963 (JA 214). Appellee Plain Dealer Publishing Co. ("Plain Dealer") is the publisher of *The Plain Dealer*, a daily newspaper that is circulated throughout the Cleveland metropolitan area and the State of Ohio.

In May 1982, Plain Dealer attempted to obtain permission from the Lakewood City Law Director to place newspaper vending machines on publicly owned property at sixteen locations within Lakewood (JA 44). Eight of these locations were within a section of Lakewood zoned for residential use (JA 44, 45). The City Law Director denied the request, citing Section 901.18 of the Lakewood Codified Ordinances, which then provided (JA 3):

ERECTING BUILDINGS OR STRUCTURES ON PUBLIC GROUND. No person shall erect or place, or cause to be erected or placed, or permit to remain, any building or structure of any nature upon any street, lane, alley, or public ground within the City.

In January 1983, Plain Dealer sued Lakewood in the United States District Court for the Northern District of Ohio. The action challenged Section 901.18 on federal constitutional grounds. On Plain Dealer's motion for summary judgment, the district court ruled that Section

¹ Under Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

901.18 was an unconstitutional exercise of police power because it totally banned one means of distributing newspapers (JA 14, 18).² Plain Dealer sought a permanent injunction against enforcement of the ordinance, but the district court held this relief in abeyance for 60 days to give Lakewood an opportunity to enact an alternative regulation governing the placement of newspaper vending machines on public property within the City (JA 18).

In October 1983, Lakewood amended Section 901.18 to allow the erection of structures on public property with the consent of the City (to the extent otherwise permitted by state and local law) (JA 265-67). In addition, Lakewood enacted a new ordinance, Section 901.181, dealing specifically with the placement of newspaper vending machines on public property in the City (JA 268-74).

Plain Dealer filed an amended complaint challenging the constitutionality of the newly enacted Section 901.181. After discussions between the City and counsel for Plain Dealer, and in response to concerns raised by Plain Dealer, an amended Section 901.181 was enacted a few days after the filing of the amended complaint. This amended version of Section 901.181 is the ordinance that was reviewed by the courts below (JA 280-84).³

Section 901.181 established a system through which permits could be obtained for the placement of newspaper vending machines on city-owned property within Lake-

² This aspect of the district court's initial decision was plainly incorrect; the record demonstrates that newspaper vending machines were, at that time, located on a number of privately owned sites within Lakewood (JA 184-85, 374). Moreover, the City Planner for Lakewood gave uncontested testimony that 75 additional privately owned sites suitable for placement of newspaper vending machines were available in Lakewood (JA 162-63). Section 901.18 expressly applied only to "public ground within the City."

³ Section 901.181 is reprinted in full in the opinion of the court of appeals (J.S. App. A4-A6 n.1).

wood zoned for commercial use. The ordinance provides that the Mayor may grant a rental permit upon payment of a \$10.00 annual rental fee for each site, submission of a certificate of insurance, and compliance with the appearance and architectural standards set by the City's Architectural Board of Review. The ordinance also provides that the granting of a permit may be subject to "such other terms and conditions deemed necessary and reasonable by the Mayor." Placement of newspaper vending machines on public property in the areas of Lakewood zoned for residential use is not permitted under Section 901.181.

Plain Dealer did not attempt to obtain a permit to place its vending machines on city-owned property. Instead, appellee chose to proceed to trial on its facial challenge to the new ordinance.

The district court entered judgment in favor of Lakewood, sustaining the amended version of Section 901.181 and dismissing Plain Dealer's complaint (JA 228). The district court found that "[t]here is no area within the City of Lakewood more than one quarter mile from an all night newspaper outlet" (JA 215). Moreover, the district court explicitly found that "[t]he City of Lakewood by its Mayor stands ready and willing to permit coin-operated newspaper dispensing devices in the commercial areas of the City as mandated by Codified Ordinance § 901.181" (JA 218). The district court concluded that "[t]he provisions of § 901.181 are the least restrictive regulations for placement of newsboxes along the streets of Lakewood" (JA 220).

The court of appeals affirmed in part and reversed in part (J.S. App. A1-A19). The court sustained Section 901.181's flat prohibition against the placement of newspaper vending machines in residential areas of Lakewood. The court held, however, that the portion of Section

901.181 applicable to commercial areas of Lakewood is unconstitutional in three respects:

- a) Section (c) (7) of the ordinance authorizes the Mayor to impose such terms and conditions as he deems "necessary and reasonable" on the granting of a permit for the placement of newspaper vending machines on the public streets;
- b) Section (a) of the ordinance subjects the design of newspaper vending machines to the approval of the City's Architectural Board of Review; and
- c) Section (c) (5) of the ordinance requires a permittee to obtain liability insurance and hold the City harmless from any liability arising from the installation or operation of newspaper vending machines.

The court of appeals started with the assumption that "[t]he right to distribute newspapers by means of newsracks is protected by the First Amendment" (J.S. App. A8). Based on this premise, the court ruled that "the City of Lakewood's ordinance unconstitutionally permits the granting of permits to be contingent upon the Mayor's unbridled discretion" (*id.* at A10). The court further held that, because the ordinance "contains no standards" to guide the Architectural Board of Review in approving or rejecting newsrack designs, the ordinance is unconstitutional under the First and Fourteenth Amendments (*id.* at A14). Finally, the court ruled that, because "neither the bus nor telephone companies are required to insure bus shelters or telephone equipment," the City "cannot impose more stringent requirements" on newspaper vending machine permittees (*id.* at A16). Therefore, the court said, "the indemnification aspect of the ordinance places an undue burden on Plain Dealer" (*ibid.*).

Judge Unthank, sitting by designation, disagreed with the majority with respect to the insurance requirements of the Lakewood ordinance. He considered these requirements "legitimate and reasonable provisions for the pro-

tection of the City from liability" (J.S. App. A19). In response to the majority's criticism of the insurance provisions, Judge Unthank stated (*ibid.*): "The fact that the City does not require insurance for public services of a quasi-governmental nature does not prohibit it from requiring insurance for other services."

In sustaining the City's total ban on newspaper vending machines in residential areas, the court of appeals acknowledged that "the ordinance leaves open ample alternative channels of communication" (J.S. App. A16), and the court quoted with approval the district court's conclusion that "[t]raffic safety, proper functioning of a City's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics are all substantial governmental interests" (*ibid.*, quoting J.S. App. A38). The court of appeals did not indicate why a similar rationale was not sufficient to justify the less restrictive portions of the ordinance governing placement of newspaper vending machines on public property in the City's commercial areas.

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

This case comes to the Court in a somewhat unusual posture that tends to obscure the fundamental issue presented for review. Lakewood initially enacted an ordinance that prohibited the placement of all structures, including newspaper vending machines, on any public ground located within the City. Plain Dealer challenged this ordinance, and the district court struck it down. Before enjoining operation of the ordinance, the district court invited the City to amend it. The City accepted the invitation and enacted the ordinance now under attack.

The City's decision to enact a new ordinance at the invitation of the district court does not alter the basic issue at stake in this appeal, namely, whether the First

Amendment compels a City to permit the placement of newspaper vending machines on public property. Although Lakewood chose to enact less restrictive legislation, decisions of this Court strongly support the power of state and local governments to prohibit the placement of such structures on public property. Recognition of this fundamental proposition provides the starting point from which analysis of the questions raised on this appeal should proceed.

State and local governments have a well-recognized power to preserve the property under their control for the use to which it is lawfully dedicated. The First Amendment does not provide newspaper publishers with a right to set aside the property interests of others, including cities and towns, in furtherance of their business interests. Nor do publishers have a right to distribute their printed matter through any means and at any time and place that they see fit. The right asserted by Plain Dealer to place newspaper vending machines on public property finds no support in the decisions of this Court.

Moreover, this Court has recognized the power of local governments completely to prohibit billboards and the posting of signs where such methods of communication cause harm to the health and safety of the public and to the aesthetic features of the local environment. These same interests underlay Lakewood's initial ordinance prohibiting the erection of structures on public ground. No contention has been made in this case that the City intended to suppress the distribution of newspapers. *Amici's* principal submission, therefore, is that local governments may, consistent with the Constitution, prohibit the placement of newspaper vending machines on public ground. This Court should so hold.

II.

Section 901.181 does not interfere with Plain Dealer's distribution of its newspaper. Rather, the ordinance grants the newspaper publisher certain limited rights with

respect to the use of Lakewood's public property, which, by definition, is owned by the City. In striking down parts of this ordinance, the court of appeals relied on decisions of this Court holding that governmental officials may not be granted unbridled discretion to permit or deny the right to engage in activities protected by the First Amendment. Such decisions have no bearing on the present case.

Where, as in this instance, the specific conduct regulated by a statute or ordinance is not constitutionally protected, a facial challenge to the legislation cannot be sustained. Instead, this Court's decisions permit a challenge to such enactments only where they have been applied in a manner that intrudes upon constitutionally protected rights. The court of appeals therefore was incorrect in invalidating, on a facial challenge, the portions of Lakewood's ordinance that grant some measure of discretion to the Mayor and the Architectural Board of Review.

The court of appeals also erred in invalidating the insurance and indemnification provisions of the ordinance. Without any citation of authority, the court ruled that these provisions improperly discriminated against the press. But the only entities and structures that the court found were treated more favorably than appellee—a bus company and its shelters and the telephone company and its equipment—are plainly distinguishable from newspaper vending machines. The relevant comparison is the City's treatment of other vending machines. There is no basis in the record for concluding that the City would not subject all other vending machines, if permitted to be placed on public property, to the same insurance requirements applicable to newspaper vending machines. In any event, as this Court has recognized, isolated exemptions of non-press entities from general regulation do not render such regulation violative of the First Amendment.

ARGUMENT

I. THIS COURT'S DECISIONS SUPPORT THE POWER OF LOCAL GOVERNMENTS TO REGULATE OR EVEN PROHIBIT THE PLACEMENT OF NEWS-PAPER VENDING MACHINES AND OTHER STRUCTURES ON PUBLIC PROPERTY

A. State And Local Governments Have Well-Established Power To Preserve Their Property For Its Lawfully Dedicated Use And To Regulate In The Interests Of Safety And Aesthetic Improvement

It is well settled that a state or local government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Here, Plain Dealer asserts a right to set aside the property rights of the City of Lakewood and permanently to occupy portions of the City's sidewalks. Plain Dealer bases its claim to such a right solely upon its status as a member of the press. That status, however, is plainly insufficient to vest Plain Dealer with the confiscatory power it claims. As this Court has squarely held, "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132 (1937).

It is also beyond dispute that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that one may desire. See, e.g., *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley v. Florida*, *supra*, 385 U.S. at 47-48. As a necessary corollary, freedom of the press "does not mean that one can . . . distribute where, when and how one chooses." *Broad v. Alexandria*, 341 U.S. 622, 642 (1951). Important rights other than those of the press are involved

in this case, and only by adjustment of these rights can the community enjoy "both full liberty of expression and an orderly life." *Ibid.*

The decisions of this Court establish that state and local governments may legitimately exercise their police powers to preserve or improve their aesthetic environments and to provide for the safety of their residents. For example, in *Berman v. Parker*, 348 U.S. 26 (1954), the Court confirmed the power of a legislature to remove blighted housing. As the Court stated, blighted housing can present "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn" (*id.* at 32-33). The Court concluded that "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary" (*id.* at 33, quoted with approval in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984)).⁴

Moreover, this Court has held that the power of state and local governments to take action to preserve or improve their aesthetic environments may often override certain interests that implicate the First Amendment.

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in pro-

⁴ Numerous other decisions of this Court have also recognized the power of state and local governments to preserve or improve their aesthetic environments. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Co.*, 272 U.S. 365, 387-88 (1926); *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

tecting its citizens from unwelcome noise. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld the City's prohibition of political advertising on its buses, stating that the City was entitled to protect unwilling viewers against intrusive advertising that may interfere with the City's goal of making its buses "rapid, convenient, pleasant and inexpensive," *id.*, at 302-303 (plurality opinion). See also *id.*, at 307 (Douglas, J., concurring in judgment); *Erznoznik v. City of Jacksonville*, 422 U.S., at 209, and n.5. *These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.*

Members of City Council v. Taxpayers for Vincent, *supra*, 466 U.S. at 805-06 (emphasis added) (footnote omitted).

More recently, this Court considered a billboard ordinance designed "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 493 (1981) (plurality opinion). A majority of the Court concluded that a City's safety and aesthetic interests are sufficiently substantial to justify a content-neutral prohibition against the use of billboards. See *id.* at 507-08 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-61 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). The Court "considered the City's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition of billboards" *Members of City Council v. Taxpayers for Vincent*, *supra*, 466 U.S. at 806-07 (citations omitted). Five Justices expressly concluded that the interest in safety was sufficient. See 453 U.S. at 507-08 (plurality opinion); *id.* at 560-61 (Burger, C.J., dissenting).

Following *Metromedia*, this Court, relying solely on aesthetic considerations, held that a ban against the posting of signs on public property was constitutional as applied to political campaign signs draped over crosswires supporting utility poles. See *Members of City Council v. Taxpayers for Vincent*, *supra*, 466 U.S. at 792. The Court explained:

As is true of billboards, the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the City, including those where appellees posted their signs These interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas.

Id. at 817. See also *City of Los Angeles v. Preferred Communications, Inc.*, — U.S. —, 106 S. Ct. 2034 (1986) (remanding for factual determination of, *inter alia*, whether visual blight stemming from installation of more than one cable television wire and related appliances was sufficient to permit City to grant only one cable television franchise); *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 106 S. Ct. 925, 929 (1986) (regulation of adult movie theatres justified by City's interest in preserving the quality of its neighborhoods and urban life).

The decisions of this Court cited above, and particularly the holdings in *Metromedia* and *Vincent*, inescapably lead to the conclusion that state and local governments have a significant and legitimate interest in enacting laws and regulations designed to preserve and improve their aesthetic environments and to promote safety.

B. The First Amendment Does Not Create A Right To Place Newspaper Vending Machines On Public Property

In striking down that portion of Section 901.181 of the Lakewood Codified Ordinances applicable to the com-

mercial areas of the City, the court below proceeded primarily from the assumption that "[t]he right to distribute newspapers *by means of newsracks* is protected by the First Amendment to the United States Constitution" (J.S. App. A8) (emphasis added). In fact, the underlying premise must have been considerably more radical than that stated by the court, because Section 901.181 concededly has no application whatsoever to the placement of newspaper vending machines on privately owned property.⁵ Thus, the legal foundation on which the court of appeals' decision must rest is that the First Amendment provides a right to place newspaper vending machines on publicly owned property. *Amici* submit that no such constitutional protection finds support in the decisions of this Court.

Of course, *amici* do not dispute that Plain Dealer and other newspapers have a constitutionally protected right to distribute their publications. Indeed, as this Court has recognized, the right to publish a newspaper would be meaningless without a concomitant right to distribute what is published. See *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). But the constitutional protection afforded to the distribution of newspapers does not imply an absolute right to a permanent physical occupation of city property to facilitate that distribution. Publication of newspapers enjoys similar constitutional protection, but no publisher would contend that a City is therefore obligated to reserve land in perpetuity for use in publishing. Plainly, the First Amendment does not require a City to lease city property to a publisher for a printing facility. Similarly, the right to distribute newspapers confers no constitutional right on Plain Dealer to occupy city property for that purpose.

Moreover, there is no right to assistance from state and local governments in distributing newspapers. See

⁵ The ordinance applies only to "the installation of newspaper dispensing devices on public property" (J.S. App. A4 n.1).

Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983) (rejecting "notion that First Amendment rights are not somehow fully realized unless they are subsidized by the State"). As this Court has recognized, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). Recognition of special rights for the press to occupy and use city property, however, would impose affirmative obligations on state and local governments to assist in the distribution of newspapers. This the First Amendment does not require. See *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974).

A second legal ground underlying the court of appeals' decision was its conclusion that Section 901.181 imposed a "prior restraint" on First Amendment rights (J.S. App. A10, A12). This conclusion is in direct conflict with the Court's recent decision in *Arcara v. Cloud Books, Inc.*, — U.S. —, 106 S. Ct. 3172 (1986).

In *Arcara*, the petitioner, a local district attorney, sought a closure order for an adult bookstore on the ground that solicitation of prostitution was occurring on the premises. The New York Court of Appeals concluded that such a closure order would constitute an unconstitutional prior restraint, and reversed the denial of the respondent bookstore owner's motion for summary judgment. In reversing the Court of Appeals' decision, this Court stated (*id.* at 3177 n.2):

The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed,

the imposition of the closure order has nothing to do with any expressive conduct at all.

Like the closure order in *Arcara*, an ordinance prohibiting placement of newspaper vending machines on the public grounds of a city or town would impose no restraint at all on the dissemination of particular materials. Newspaper publishers would remain free to carry on the sale of their newspapers through numerous familiar means, including home delivery, newsstands, grocery and convenience stores, and vending machines located on private property. Moreover, prohibiting placement of newspaper vending machines on public property has nothing whatever to do with the content of any expressive activity.

C. State And Local Governments May Prohibit Placement Of Newspaper Vending Machines On Public Property Where Ample Alternative Means Of Distribution Are Available

This Court has repeatedly recognized the substantial and legitimate concerns of state and local governments for the rights of persons who may be affected by others' exercising their First Amendment rights. The Court has held that time, place, and manner regulations are permissible "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), quoted with approval in *Heffron v. International Society for Krishna Consciousness*, *supra*, 452 U.S. at 648.

First, an ordinance that prohibits placement of all newspaper vending machines on city-owned property is content-neutral. Indeed, there has been no contention in this case that any of the challenged ordinances enacted by Lakewood were anything other than content-neutral. *Amici* submit, therefore, that prior decisions of this Court

make clear that prohibiting the placement of newspaper vending machines on public property does not run afoul of the First Amendment's prohibition against regulation of expressive activity based on "its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). See also *Arkansas Writers' Project v. Ragland*, No. 85-1370 (April 22, 1987).

Second, the prohibition or regulation of newspaper vending machines serves significant governmental interests. As noted earlier, seven Justices in *Metromedia* explicitly concluded that the interest of the City of San Diego in avoiding visual clutter was sufficiently substantial to justify a prohibition of billboards, and a majority of the Court also determined that the City's interest in promoting safety was sufficient to support such a prohibition.⁶ In reliance on *Metromedia*, this Court subsequently held that "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit." *Members of City Council v. Taxpayers for Vincent*, *supra*, 466 U.S. at 807.

The newspaper vending machines that Plain Dealer seeks to place throughout Lakewood are significantly more intrusive than the relatively small cardboard signs at issue in *Vincent*. The signs at issue in *Vincent* measured 15 by 44 inches and were draped temporarily over utility pole crosswires during a local political campaign.⁷ *Id.*

⁶ The ordinance at issue in *Metromedia* by its terms applied to "outdoor advertising display signs." 453 U.S. at 493. The California Supreme Court defined the term "advertising display sign" as "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." *Ibid.* (quoting from 26 Cal. 3d 848, 856 n.2, 610 P.2d 407, 410 n.2 (1980)).

⁷ The *Vincent* Court declined appellees' request that it consider the subject ordinance's impact on persons other than themselves,

at 792-93. Plain Dealer's newspaper vending machines are 49 inches high, 19 inches wide, and 16¼ inches deep, and they weigh approximately 100 pounds (JA 92). Each vending machine is either weighted down by a concrete block or chained to a utility pole or other immovable object that is not owned by Plain Dealer (JA 90). Moreover, the newspaper vending machine is placed in a particular location permanently, generally occupying a specific piece of property for months or years (JA 218).⁹

As this Court has observed, "[i]t is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'aesthetic harm.'" *Metromedia, Inc. v. San Diego*, *supra*, 453 U.S. at 510 (plurality opinion), quoted with approval in *Members of City Council v. Taxpayers for Vincent*, *supra*, 466 U.S. at 809. *Vincent* held that "[t]he same is true of posted signs." *Ibid.* Amici submit that the same conclusion also applies to newspaper vending machines.⁹

expressly limiting its analysis to the signs that had been posted by appellees. 466 U.S. at 803.

⁹ As this Court noted in *Vincent*, *supra*, 466 U.S. at 809-10, the First Amendment does not extend the same protection to means of communication left unattended by the speaker as it does to an individual who remains on the scene to distribute his message.

⁹ Appellant relied on more than speculation in the district court in support of its contention that newspaper vending machines cause harm to the safety and aesthetic interests of the City. The City Planner for Lakewood testified at length concerning the detrimental impact that placement of newspaper vending machines on public property would have on the City's appearance (JA 151-54, 168-69). Testimony was also presented in the district court with respect to the traffic and other safety hazards associated with newspaper vending machines (JA 89, 124-25, 128, 142, 145-46, 151-54, 157-58). See also G. Longhini, *Coping With High Tech Headaches*, 50 *Planning Contents* No. 3, March 1984 (relevant portions reprinted at JA 394) (noting safety and aesthetic problems caused by newspaper vending machines in cities and towns throughout the country).

The final requirement for a valid time, place, and manner restriction is that it must be narrowly tailored to accomplish its purpose. In *Vincent*, the Court considered whether the complete prohibition on posting signs was appropriate to serve the City's interest in light of the district court's finding that "the signs prohibited by the ordinance do constitute visual clutter and blight." 466 U.S. at 808. By banning these signs, the Court concluded, "the City did no more than eliminate the exact source of the evil it sought to remedy." *Ibid.* The Court reached the identical conclusion with respect to billboards in *Metromedia*. See 453 U.S. at 510-12, 549-53, 560-61, 570. Similarly, in this case, the newspaper vending machines constitute the very harm to the public health and safety and the local aesthetic environment that the City of Lakewood sought to eliminate.¹⁰

The prohibition against billboards that this Court was prepared to uphold in *Metromedia* was significantly more restrictive than Section 901.181, because it completely foreclosed one medium of communication. 453 U.S. at 503-04. Even if the placement of newspaper vending machines on publicly owned property is prohibited, the medium of expression at issue in this case will continue in prominent use. Newspapers will be distributed through a number of common, readily available, alternative channels, such as home delivery, newsstands, stores, and vending machines located on privately owned property.¹⁰

No argument can be made in this case that Lakewood's ordinance is invalid because it does not leave available adequate alternative methods of distribution. See *Members of City Council v. Taxpayers for Vincent*, *supra*,

¹⁰ Unlike the billboards and political signs considered at issue in *Metromedia* and *Vincent*, the newspaper vending machines at issue here do not themselves constitute the message sought to be conveyed. Newspapers (and their contents), which will continue to be distributed throughout Lakewood regardless of whether newspaper vending machines are permitted to be placed on city-owned property, constitute the message at issue in this case.

466 U.S. at 812. The record in this case clearly demonstrates that ample alternative methods of distribution are available to Plain Dealer.¹¹ To paraphrase this Court's conclusion in *Vincent* (466 U.S. at 812):

Notwithstanding appellee['s] general assertions in their brief concerning the utility of [newspaper vending machines located on public property], nothing in the findings indicates that the [distribution of newspapers through vending machines located on] public property is a uniquely valuable or important mode of [distribution], or that appellee['s] ability to [distribute] effectively is threatened by ever-increasing restrictions on [distribution].

In sum, an ordinance prohibiting placement of newspaper vending machines on public property is content-neutral, unrelated to the suppression of free expression, addresses a substantial governmental interest, is narrowly tailored to address that interest, and leaves open ample alternative methods of distributing newspapers. Such an ordinance does not violate the First Amendment.

¹¹ The district court expressly found the following facts (JA 214-15):

6. The Plain Dealer Publishing Company sales in a general sense are 77 percent by home delivery through junior carriers or adults and 80 percent on Sundays by home delivery, the balance of sales being by single copy sales through retail outlets and coin-operated vending boxes, the latter constituting 23 percent of single copy sales, or 4.6 to 5.29 percent of total sales.

* * * * *

8. There is no area within the City of Lakewood more than one quarter mile from an all night newspaper outlet, i.e., stores open all night or newspaper dispensing boxes located on property owned other than by the City of Lakewood.

The City Planner for Lakewood testified that there are also 75 potential privately owned sites that would accommodate newspaper vending machines within the City of Lakewood (JA 162-63).

II. THE CITY OF LAKEWOOD'S ORDINANCE VALIDLY GRANTS THE MAYOR AND THE ARCHITECTURAL BOARD OF REVIEW SOME MEASURE OF DISCRETION IN THE REGULATION OF NEWSPAPER VENDING MACHINES LOCATED ON PUBLIC PROPERTY, AND VALIDLY REQUIRES A PERMITTEE TO OBTAIN INSURANCE

The court of appeals struck down that portion of Section 901.181 that applies to the commercial areas of Lakewood on the grounds that the ordinance allows the Mayor and the City's Architectural Board of Review too much discretion in the granting of permits and that the grant of a permit may not be conditioned on the permittee's obtaining insurance. Both aspects of the court's holding are incorrect.¹²

A. The Discretion Granted To The Mayor And The Architectural Board Of Review Does Not Render Section 901.181 Facially Invalid

As demonstrated above, there is no constitutionally protected right to distribute newspapers through newspaper vending machines located on public property. Where an individual has no constitutionally protected right to engage in the particular activity regulated by a challenged ordinance, it necessarily follows that the ordinance cannot be found invalid on its face. *See Greer v.*

¹² The court of appeals upheld that portion of the ordinance that imposes a total ban on placing newspaper vending machines on public property located in residential areas of the City. The court's opinion strongly suggests that a total ban throughout the City would have been upheld (J.A. App. A16-A17). Surely the aesthetic and safety related harms cited by the court of appeals as sufficient grounds to support the ban in residential areas are at least as pressing in the commercial areas of the City. *See Members of City Council v. Taxpayers for Vincent, supra*, 466 U.S. at 817 ("[T]he esthetic interests that are implicated . . . are presumptively at work in all parts of the City The character of the environment affects the quality of life and the value of property in both residential and commercial areas").

Spock, 424 U.S. 828, 838 (1976). See also *Members of City Council v. Taxpayers for Vincent*, *supra*, 466 U.S. at 797-98 ("a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner" or "that a statute's very existence [interferes with] constitutionally protected speech or expression"). For this reason, Plain Dealer cannot challenge Section 901.181 unless and until it has been applied to Plain Dealer in a manner that assertedly infringes its constitutional rights.

The court of appeals rejected the City's contention that, because Plain Dealer never applied for a permit, *Greer v. Spock* foreclosed the challenge to Section 901.181 (J.S. App. A12-A13). The court observed that the regulations challenged in *Greer* were found not to interfere with a constitutionally protected right and that this Court therefore held that they were not subject to challenge on facial invalidity grounds (J.S. App. A12-A13). The court apparently found *Greer* inapplicable, however, because, under the court's erroneous premise, the placement of newspaper vending machines on public property was constitutionally protected (*id.* at A8).

Greer held that there is "no generalized constitutional right to make political speeches or distribute leaflets" on a military base. 424 U.S. at 838. On that basis, the Court concluded that the challenged Fort Dix regulations were not "constitutionally invalid on their face." *Ibid.* The Court further observed that none of the respondents had sought permission to distribute political literature at Fort Dix and that military officials therefore had not had any occasion to apply the regulations governing such requests for approval. *Id.* at 840. Accordingly, the Court ruled, no question regarding the validity of the regulations as applied was properly raised. *Ibid.*

Similarly, Plain Dealer has no generalized constitutional right to place newspaper vending machines on public property. It follows that Section 901.181 is not in-

valid on its face and that the court of appeals erred in holding that it is. Plain Dealer has never attempted to obtain a permit to place newspaper vending machines on public property within Lakewood, and neither the Mayor nor the Architectural Board of Review has had any opportunity to exercise discretion under the challenged ordinance. Accordingly, Plain Dealer is in no position to challenge Section 901.181 as applied.¹³

The discretion granted to the Mayor under Section 901.181, limited as it is by the requirement that any reason for the denial of a permit be stated, is a reasonable grant of power under an ordinance that provides for the leasing of the City's property. The discretion granted to the Architectural Board of Review is even more limited. The Board's discretion is confined to the design of newspaper vending machines, and there is no basis in the record for suggesting that the Board would seek to extend its authority into other areas. The fact that the ordinance does not specify architectural standards applicable to newspaper vending machines does not make the Board's discretion "unbridled." No authority to engage in content-based decisionmaking has been delegated to the

¹³ The cases cited by appellee in its Motion to Affirm (at 12) in support of its argument that Section 901.181 improperly vests local officials with discretion are all inapposite. Each of the cited cases involved an attempted regulation of communicative activity that, in and of itself, was entitled to some First Amendment protection. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (charitable solicitation); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (door-to-door solicitation for charitable and political causes); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (parade); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (soliciting for union membership); *Kunz v. New York*, 340 U.S. 290 (1951) (public worship meetings); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Seis v. New York*, 334 U.S. 558 (1948) (religious address using sound amplification equipment); *Largent v. Texas*, 318 U.S. 418 (1943) (distribution of religious publications). As we have shown, the same is not true of newspaper vending machines.

Board, and the Board has not been empowered to stray beyond architectural and design considerations in reviewing the acceptability of proposed vending machines.¹⁴

The proliferation of newspaper vending machines in many cities and towns across the country is a relatively recent phenomenon.¹⁵ State and local governmental officials need some flexibility in dealing with such developing features of urban life. In the absence of any evidence that the discretion conferred by Section 901.181 has been exercised in a manner that threatens to curtail First Amendment rights—and there is no such evidence in this case—the ordinance should be sustained.

B. The Insurance And Indemnification Provisions of Section 901.181 Do Not Violate The First Amendment

The court of appeals also held that the insurance and indemnity requirements imposed under Section 901.181 are unconstitutional. The court found that such requirements had not been imposed with respect to other structures located on the City's property (J.S. App. A14-A16). Although it is true that the City cannot impose more stringent requirements on the press than it does on others (see *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)), the ordinance does not effect such a result.

The court below attributed far too much significance to the City's failure to require the bus and telephone

¹⁴ The purposes of the Architectural Board of Review are prescribed by Section 1323.03 of the Lakewood Codified Ordinances (J.S. 9 n.6). These purposes are

to protect the value, appearance, and use of property on which buildings are constructed or altered, to maintain a high character of community development, to protect the public health, safety, convenience, and welfare, and to protect real estate within the City from impairment or destruction of the values.

¹⁵ See generally G. Longhini, *Coping With High Tech Headaches*, *supra* note 9.

companies to provide insurance comparable to that required from persons seeking permits for newspaper vending machines (J.S. App. A16). As Judge Unthank noted in his separate opinion, the bus and telephone companies provide "public services of a quasi-governmental nature" (*id.* at A19). The nature of the services provided by these enterprises provides a rational basis for treating them differently from Plain Dealer. Thus, the insurance and indemnity requirements of Section 901.181 should be upheld as "legitimate and reasonable provisions for the protection of the City from liability" (J.S. App. A19).

Moreover, although the insurance and indemnification provisions apply only to newspaper vending machines, no other vending machines are even permitted on public property in Lakewood. Nothing in the record suggests that similar insurance requirements would not be imposed on other commercial vending machines if they were permitted to be placed on public property at all. The fact that no vending machines for other commercially distributed products are permitted on the City's property demonstrates that, to the extent that the press has been treated differently from similarly situated non-press entities, the differential treatment has favored the press.

Finally, as this Court expressly recognized in *Minneapolis Star*, a legislative decision to exempt certain non-press entities from a statutory obligation does not automatically render the statute violative of the First Amendment. Rather, where such exemptions are "isolated exceptions and not the rule," the statute passes constitutional muster. 460 U.S. at 583 n.5 (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 193 (1946)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PETER BUSCEMI

JOSEPH BROOKS

MORGAN, LEWIS & BOCKIUS

1800 M Street, N.W.

Washington, D.C. 20036

(202) 872-5000

Of Counsel

BENNA RUTH SOLOMON *

Chief Counsel

JOYCE HOLMES BENJAMIN

BEATE BLOCH

STATE AND LOCAL

LEGAL CENTER

444 North Capitol St., N.W.

Suite 349

Washington, D.C. 20001

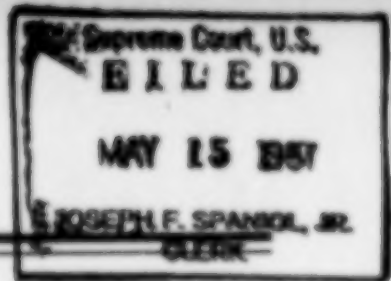
(202) 638-1445

* *Counsel of Record for the
Amici Curiae*

AMICUS CURIAE

BRIEF

(86)
No. 86-1042



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CITY OF LAKEWOOD,
Appellant,
v.

PLAIN DEALER PUBLISHING CO.,
Appellee.

On Appeal from the United States Court
of Appeals for the Sixth Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS IN
SUPPORT OF APPELLANT, CITY OF LAKEWOOD**

ROGER F. CUTLER
City Attorney
100 City-County Bldg.
Salt Lake City, UT 84111

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, SC 29217

WILLIAM H. TAUBE
Corporation Counsel of Chebanse
359 E. Hickory
P.O. Box 51
Kankakee, IL 60901

MARVA JONES BROOKS
City Attorney
Department of Law
1100 Omni International
Atlanta, GA 30335

WILLIAM I. THORNTON, JR.
City Attorney
101 City Hall
Durham, NC 27701

(attorneys continued on inside front cover)

JOHN W. WITT
City Attorney
202 "C" Street
City Administration Bldg.
San Diego, CA 92101

ROBERT J. ALFTON
City Attorney
A-1700 Hennepin County
Government Center
Minneapolis, MN 55487

JAMES K. BAKER
City Attorney
600 City Hall
Birmingham, AL 35203

JOSEPH N. deRAISMES
City Attorney
P.O. Box 791
Boulder, CO 80306

FRANK B. GUMMEY, III
City Attorney
P.O. Box 551
Daytona Beach, FL 32015

DOUGLAS N. JEWETT
City Attorney
Municipal Building
Tenth Floor, Law Department
Seattle, WA 98104

ROBERT J. MANGLER
Corporation Counsel
1200 Wilmette Avenue
Wilmette, IL 60091

NEAL E. MCNEILL
City Attorney
200 Civic Center
Room 316
Tulsa, OK 74103

JOSEPH I. MULLIGAN
Corporation Counsel
615 City Hall
1 City Hall Square
Boston, MA 02201

ANALES LIE MUNCY
City Attorney
1500 Marilla
Room 7DN
Dallas, TX 75201

DANTE R. PELLEGRINI
City Solicitor
313 City-County Building
Pittsburgh, PA 15219

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314, City Hall
Memphis, TN 38103

CHARLES S. RHYNE
Counsel of Record
JAN MAJEWSKI
RACHEL S. ULLMAN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5424

*Attorneys for National Institute
of Municipal Law Officers as
Amicus Curiae*

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CITY OF LAKEWOOD,
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**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS IN
SUPPORT OF APPELLANT, CITY OF LAKEWOOD**

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is filed pursuant to Rule 36 of the Rules of this Court on behalf of the more than 1,900 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and other titles. The Appellant, City of Lakewood, is a member of NIMLO.

The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and for the political subdivision of the state, territory, or commonwealth of which they are the authorized law officer thereof.

The local government attorneys who operate NIMLO are responsible for advising their city governments on the best lawful methods for promoting health and safety within their jurisdictions and on the regulation of business enterprises, such as newsracks. These attorneys also represent their governments in litigation resulting from the enforcement of business and safety regulations, such as the newsrack ordinance before this Court. The United States Court of Appeals for the Sixth Circuit has held that the City of Lakewood's ordinance providing such regulation was unconstitutional in part.

NIMLO believes that the decision of the Sixth Circuit does not properly recognize a municipality's broad power to regulate businesses for the public good. This decision will severely curtail the ability of local governments to use their police powers to foster and protect the health, safety and welfare of their citizens. NIMLO, therefore, urges the reversal of the Sixth Circuit's decision which conflicts with said powers of the State of Ohio under the Constitution of the United States as delegated by said State to the City of Lakewood.

Consent to the filing of this brief has been granted by both parties and copies of these letters have been lodged with the Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Appellant, City of Lakewood, in its Jurisdictional Statement.

SUMMARY OF ARGUMENT

Cities may use their broad police power to regulate businesses in furtherance of public welfare. Newsrack businesses, if not adequately regulated, pose significant safety and aesthetic problems for cities by blocking access to sidewalks and causing traffic congestion. The City of Lakewood's newsrack ordinance, which promotes public welfare by restricting the location and design of newsracks, is a lawful business regulation.

The need to require insurance and indemnity from business operators is acute because cities nationwide are presently suffering from an insurance crisis. Many insurance companies now either refuse to insure cities or insure them at prohibitive premiums and provide drastically lower coverage. In response to this development, cities, under their police power, have had to pursue sound risk management policies to protect the welfare of their residents and the public fisc. The policies include the requirement that those seeking to use public property for nonessential purposes provide adequate protection to governments. Lakewood, along with other cities, now requires business operators, such as newsrack owners, to insure and indemnify it against claims involving their businesses.

Businesses which are entitled to First Amendment protection are still subject to reasonable time, place, and manner regulations by cities. Lakewood's newsrack ordinance

is a permissible business regulation which does not unconstitutionally restrict First Amendment rights. It applies to all newsracks regardless of content, it is narrowly tailored to promote safety and aesthetics, and in no way does it impede newspapers from being sold through retail outlets, home delivery, and licensed newsracks.

Lakewood's ordinance provides standards and procedural safeguards to protect newsrack applicants from arbitrary permit denial. Lakewood's Architectural Board of Review applies sound architectural principles to each newsrack application to ensure aesthetic harmony between newsracks and their surroundings. In addition to the standards used by the review board, the Mayor, after reviewing a newsrack application for compliance with health, safety and welfare concerns, must state the reasons for a permit denial. If an applicant is not pleased with the decision on his application, the right to appeal to the city council and then to the courts exist.

Not having applied for a permit, it is doubtful that a justiciable controversy exists between the Appellee and Lakewood. Lakewood has not denied Appellee a license nor has it placed unreasonably discriminatory terms upon it. The record, therefore, fails to contain any evidence of the ordinance's unconstitutional application.

ARGUMENT

I. CITIES MAY LAWFULLY REGULATE NEWSRACK BUSINESSES

The City of Lakewood ordinance before this Court lawfully regulates newsrack businesses by promoting public safety and attempting to ensure an aesthetic environment.

A city, under its general police power, may regulate businesses within its jurisdiction as long as the regulation promotes the public health or welfare and is not unreasonable, capricious or arbitrary. *Berman v. Parker*, 348 U.S. 26, 32-34 (1954). A city may enact ordinances to foster city aesthetics and resident safety. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981). Upon review, police power regulations will be upheld unless found to be so unreasonable and arbitrary as to impermissibly invade constitutionally protected rights. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Lakewood demonstrated at trial that newsracks contribute to pedestrian and auto traffic congestion and cause aesthetic damage to the community. The record includes reference to many disturbing situations. Newsracks block easy access to sidewalks due to their close proximity to curbs, crosswalks, fire hydrants and ramps for the handicapped. (Record at 170-74). In addition, motorists stop during rush hour to purchase newsrack papers and compound traffic congestion by causing drivers to swerve out of way of the stopped vehicles. (Record at 126, 132). Aesthetically, newsracks create visual clutter on sidewalks by being randomly placed without regard to design or color. (Record at 170).

The right to regulate newsstands was specifically addressed by the Supreme Court of Pennsylvania in *46 South 52nd Street Corp. v. Manlin*, 398 Pa. 304, 319, 157 A.2d 381 (1960). That court said that a "city may be perfectly justified in concluding that a newsstand is the practical, sane solution to what otherwise would be an overwhelming problem in a heavily populated democratic community. Whether and how such newsstands shall be permitted is for the city . . . to decide."

Lakewood's ordinance is a reasonable response to the necessity of providing safe and easy access to its streets and sidewalks and limiting visual clutter while permitting newsracks to be located in the City. The ordinance directs the Mayor to allow newsracks where they will not interfere with pedestrian and vehicle safety and empowers the Architectural Board of Review to permit the installation of newsracks that will be in harmony with their surroundings. Lakewood's ordinance, therefore, is a lawful business regulation which promotes public welfare without invading constitutionally protected rights.

II. INHERENT IN THE RIGHT TO REGULATE, CITIES HAVE AN OBLIGATION TO THEIR RESIDENTS TO REQUIRE INDEMNIFICATION FOR LIABILITY RELATED TO CITY SIDEWALK ACTIVITIES.

Cities nationwide are responsible for dangerous conditions on their sidewalks. Just a partial survey of existing city codes has revealed that many municipalities protect themselves against the risk newsracks impose by requiring those who want their newsracks on public property to provide liability insurance or indemnification. See Appendix A. Indeed, Appellee presently insures other cities where its newsboxes are located. (Record at 217-18). Thus, amici fails to see how Appellee can object to a similar requirement imposed by the City of Lakewood. In this era of insurance and municipal liability crises,¹ it is prudent

¹See Professional Engineers in Private Practice and the Legislative and Government Affairs Committee, *The Liability Crisis* (1985), for a discussion of the background of the problem, the current situation and various ways to solve the crisis; see U.S. Conference of Mayors, *Municipal Liability Concerns: A 145 City Survey* (July 1986), for a summary of the cause of the national liability crisis and its impact on cities.

risk management for cities to require insurance and indemnification.² With the disintegration of municipal immunity,³ cities, under the theory of joint and several liability, are perceived as "deep pocket" defendants.⁴

Many insurance companies, faced with picking up the tab for this increased liability, are now either refusing to insure cities, or insuring them at ridiculously high rates.⁵ To overcome this situation, municipalities must take steps, such as Lakewood has done here, to improve local government risk liability.

Appellee asserts that Lakewood is discriminating against newsrack operators by requiring insurance from them while not requiring insurance from other entities which

²See Emery, *Risk Transfer through Indemnification and Certificates of Insurance*, GOV'T RISK MGMT. REP., Jan. 1987. "Public entities have become easy targets when any question of control and responsibility is not clearly defined by contract."

³See, for example, the following state cases wherein municipal immunity was either waived or abolished: *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Holitz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

⁴See *Municipal Exposure to Joint and Several Liability*, THE MUNICIPALITY, Mar. 1987, at 73-74; New York State Assembly Committee on Local Governments, "Deep Pockets" A Study of Municipal Tort Liability (May 1985).

⁵The following companies no longer insure city governments: Aetna Casualty & Surety; American General; Cherokee; Canadian Indemnity; Home Indemnity; Ideal Mutual; INA/CIGNA; St. Paul; Compass; Great Southwestern Fire; Guaranty National; Transit Casualty; and United National. D. LaBrec, *The Revolution in the Municipal Liability Insurance Market: Report of Municipal and Public Official Liability Insurance Committee of NIMLO 1985-86* (Oct. 19, 1985) at 4, 5. See Blodgett, *Premium Hikes Stun Municipalities*, 72 A.B.A.J. 48-49 (1986), for examples of "stunning" rate increases; see *Public Liability Market Seen Shrinking*, PUB. AD. TIMES, Nov. 1984.

have structures on the City's right of way. The equal protection guaranteed by the Fourteenth Amendment requires that similarly situated persons must be treated the same under the law. See *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [City]'s objective." *Id.* at 425.

Lakewood has classified structures in its right of way into two groups. Those providing traditional, or essential public services and those providing nonessential services.⁶ Cities that allow nonessential businesses to locate on their rights of way generally require those businesses to pay for the costs associated with their activity.⁷ This requirement reflects the fact that cities, while generally denied the right to recoup the costs associated with performing traditional government functions,⁸ are not required to subsidize nonessential services. Appellee has advanced no justification for its request that a city subsidize a nonessential service such as the placing of newsracks on city property. Lake-

⁶Philadelphia also has classified structures as being either essential or nonessential. Telephone booths, utility poles and parking meters are permitted on the City's right of way because they provide an essential public service, while newsstands are denied the right to locate there because they are nonessential to the distribution of newspapers. 46 S. 52nd St. Corp. v. Manlin, 398 Pa. 304, 312 & n. 5, 313-17, 157 A.2d 381 (1960). Plain Dealer's newsracks are also nonessential to the distribution of newspapers, as evidenced by the small percentage of total newspaper sales attributed to them. (Record at 46-47).

⁷See, for example, the following city codes which require an applicant to provide insurance before the city will issue a business permit: Akron, Ohio, Code § 111.094 (1979); Jacksonville, Fla., Mun. Code § 160.113 (1983); Peoria, Ill., Code § 36-104 (1985).

⁸See *Hagerty v. Village of Bruce*, 82 Wis. 2d 208, 262 N.W.2d 102 (1978) where the Wisconsin Supreme Court held that a city would be liable to third parties injured on a sidewalk despite a city ordinance delegating the duty to keep sidewalks safe to the abutting land owner.

wood's ordinance reflects prudent risk management in requiring insurance for such activity.

Moreover, rather than being discriminated against, Lakewood has placed Appellee in a privileged position by allowing them to place coin-operated vending machines on its sidewalks.⁹ No other type of business in Lakewood is afforded this opportunity.

Lakewood and cities nationwide may, therefore, invoke their police power to require newsrack operators to insure and indemnify them against accident claims involving newsracks. Additionally, to require a business activity to pay its own way, while subsidizing activities which provide a traditional government service, is a valid exercise of municipal police power.

III. IF THE LAKEWOOD ORDINANCE INCIDENTALLY RESTRICTS FIRST AMENDMENT PROTECTED EXPRESSION, IT SHOULD BE UPHOLD AS A VALID TIME, PLACE OR MANNER RESTRICTION.

Activities protected by the First Amendment are subject to reasonable time, place or manner regulations by cities. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). On appeal, Lakewood's right to regulate newsracks was recognized by the Sixth Circuit. The Court upheld the remaining provisions of the newsrack ordinance, which included newsrack

⁹See *Gannett Satellite Info. Network v. Metro. Transp. Auth.*, 745 F.2d 767, 773-74 (2nd Cir. 1984) where the Second Circuit addressed a similar discrimination complaint by a newspaper and held that the MTA could charge rental fees for newsracks on its property while not charging other vendors for the use of its property.

rental fees and a ban on newsracks from residential areas.¹⁰

A regulation which infringes on First Amendment rights will be upheld when it is content neutral, narrowly tailored to achieve its goals, and leaves open alternative channels of communication. *Clark*, 468 U.S. at 293. There is no question that Lakewood's ordinance is content neutral. It applies to all newsracks without exception. Moreover, unlike other ordinances which have attempted to eliminate blight and ensure public safety by totally prohibiting newsracks,¹¹ Lakewood has narrowly tailored its ordinance by requiring insurance to compensate injured parties, by providing for design review to ensure compatibility with the newsrack's surroundings and by entrusting its local government, through the office of the mayor, to determine where newsracks may best be installed to not interfere with public health and safety. It is not disputed that Appellee has many other alternative channels of communications already used to provide city residents with its product. Appellee presently distributes its newspaper by home delivery, retail outlets and newsracks. (Record at 46-47). Newsrack sales account for only 5 to 6 percent of Appellee's total newspaper sales. (Record at 47).

Appellee's complaint with Lakewood's ordinance is that it is too restrictive of Appellee's right to locate newsracks in the City. This Court has never authored an opinion requiring narrowly tailored time, place and manner restric-

¹⁰*Plain Dealer Pub. Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986), *prob. juris. noted*, 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1042).

¹¹*See Southern N.J. Newspapers v. N.J.*, 542 F. Supp. 173 (D.N.J. 1982); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (1985).

tions which serve a legitimate governmental purpose to be the least restrictive of the options available to local governments. See *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984). In *City of Watseka v. Illinois Public Action Council*, 107 S. Ct. 1389 (1987) the Court affirmed without opinion a decision of the Seventh Circuit which required a less restrictive alternative to the solicitation ordinance at issue before it. That ordinance removed *all* opportunities for solicitation during certain times to protect residents' privacy. *Watseska* did not hold that a less restrictive governmental alternative should be adopted when, as is the case here, an infringement of First Amendment rights is incidental at best, no privacy interest is involved, and numerous opportunities exist for making newspaper sales at all times. Because Lakewood's ordinance satisfies the requirements expressed in *Clark*, it should be upheld as a reasonable newsrack regulation.

IV. LAKEWOOD'S ORDINANCE PROTECTS NEWSRACK PERMIT APPLICANTS FROM ARBITRARY PERMIT DENIAL BY PROVIDING STANDARDS AND PROCEDURAL SAFEGUARDS.

A. Standards Are Sufficiently Clear To Permit Delegation Of Design And Safety Decisions To Administrative Officials.

Ordinances requiring structures to be aesthetically pleasing are generally attacked as being vague or standardless. The problem inherent in such ordinances is that concepts of beauty, by their nature, do not subscribe to standardization. A certain degree of flexibility is needed to ensure that the best decisions for their respective communities are made by local governments.¹² Several com-

¹²*See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

munities solve this problem by either requiring structures to be "attractive" or by establishing a design review board to evaluate situations on a case by case basis. When ordinances rely on broad aesthetic concepts, they may be subject to vagueness challenges.¹³ Design review ordinances, such as Lakewood's do not present such constitutional problems. *See Reid v. Architectural Board of Review of Cleveland Heights*, 119 Ohio App. 67, 192 N.E.2d 74 (Cuy. County Ct. 1963). Lakewood's review board applies sound architectural standards on a case by case basis, thereby remaining responsive to modern design developments while fulfilling the city's legitimate goal of aesthetic harmony in its use of public property.

Contrary to Appellee's claims, Lakewood's ordinance does not delegate standardless discretion to deny permits. Standardless discretion exists, for example, when officials refuse to grant a permit because they do not approve of an applicant. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Lakewood's ordinance requires the Mayor to state the reasons for the denial of a permit, which will later serve as the basis for review of the decision. This policy provides a balance between the need to maintain flexibility and the desire to avoid unfettered discretion which can allow officials to deny permits solely for personal whims.

The problems presented by our rapidly changing society have called for the use of general standards to fulfill valid police power objectives.¹⁴ Two such objectives are aesthet-

¹³Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 614-16 (1971).

¹⁴*See Sheeran v. Progressive Life Ins. Co.*, 182 N.J. Super. 337, 440 A.2d 469 (1981); *In re Heller Suspension*, 73 N.J. 292, 374 A.2d 1191 (1977). Should newsrack operators decide to use their newsracks to advertise pornographic films and sexual aids, cities would be able to protect their aesthetic interests by enforcing the general standards contained in their newsrack ordinances. Without this flexibility, each new problem presented by the use of newsracks, would necessitate the enactment of a new ordinance.

ics and safety. City councils do not have to set forth a completely comprehensive list of standards to determine all design questions or all possible safety hazards in order to enact a valid aesthetic ordinance.¹⁵ NIMLO's library of city codes contains several examples of such local ordinances by which governments have solved design and safety problems by creating architectural or design review boards.¹⁶

B. Procedural Safeguards Are Present To Protect Appellee's Due Process Rights.

In *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 675-76 (11th Cir. 1984) the Court of Appeals determined that an ordinance providing city officials with the discretion to deny permits for the operation of newsracks if they find violations of any "applicable" ordinances was unconstitutional since safeguards, such as prompt judicial review, were not provided by the ordinance. Here, sufficient procedural safeguards exist to protect against any infringement of Appellee's First Amendment rights should the standards used by the Mayor or the Architectural Review Board be determined to not restrict their discretion.

Appellee cites *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and the Sixth Circuit opinion refers to *Kunz v. New York*, 340 U.S. 290 (1951), for the proposition that prompt judicial review is not sufficient to protect a newspaper from a prior restraint. Neither *Cantwell* nor *Kunz* are controlling in this case since there are significant

¹⁵*See Maher v. City of New Orleans*, 516 F.2d 1051, 1061 - 63 (5th Cir. 1975) where the Fifth Circuit upheld New Orleans' architectural review ordinance despite a lack of objective standards.

¹⁶*See Appendix B.*

factual differences. In *Cantwell*, an ordinance required the state's secretary of public welfare to determine whether a "religious cause" was truly religious. This Court held that judicial review for any abuses in licensing in *Cantwell* was not sufficient to protect against prior restraints. *Cantwell*, 310 U.S. at 306. Similarly, in *Kunz*, this Court ruled that New York may not vest control over the right to speak on religious subjects in an official where no standards exist. *Kunz*, 340 U.S. at 295.

The Lakewood ordinance differs from those in *Cantwell* and *Kunz* in two major respects. First, Lakewood's ordinance is content neutral. The ordinance requires that all newsracks must be licensed, regardless of what is placed inside them. Second, a *Cantwell* or *Kunz* prior restraint is not present here, because no religious speakers have been prevented from speaking and Appellee's newspaper is widely distributed throughout the City by home delivery and numerous retail outlets. (Record at 46-47).

This Court has determined that prompt decisions by an administrative board and the availability of prompt judicial review satisfies due process considerations, even in the case of a prior restraint allegation. *Freedman v. Maryland*, 380 U.S. 51 (1975). Section 901.181 of the Lakewood ordinance and section 2506.01 of the Ohio Revised Code provide:

§ 901.181 Newspaper dispensing devices; permit and application.

(e) A person aggrieved by a decision of the Mayor in refusing to grant or revoking a rental permit shall have the right to appeal to [the City] Council.

§ 2506.01 Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located.

Therefore, because Lakewood's ordinance provides for an appeal to the City Council and the Ohio Revised Code provides for prompt judicial review of any city action, adequate procedural safeguards are present to satisfy the Court's concerns as expressed in *Freedman* and to protect Appellee's due process rights.

V. NO JUSTICIABLE CONTROVERSY EXISTS BECAUSE LAKEWOOD'S ORDINANCE HAS NOT BEEN APPLIED IN AN UNCONSTITUTIONAL MANNER.

Although Appellee has not applied for a permit or otherwise submitted itself to the authority of the Architectural Board of Review Appellee fears that Lakewood's ordinance will be unconstitutionally applied. In a similar situation, the Second Circuit, in *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 776 (2nd Cir. 1984), stated that it was doubtful that a justiciable controversy with respect to the reasonableness of newsrack licensing terms existed because the MTA had not arbitrarily denied Gannett a license nor had it imposed unreasonably discriminatory terms upon it. The Sixth Circuit attempted to distinguish *Gannett* by determining that this case involves a facial challenge to adopted licensing requirements while in *Gannett*, no licensing requirements had been adopted. *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d

1139, 1146 (6th Cir. 1986), *prob. juris. noted*, 55 U.S. L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1042). The Sixth Circuit then determined Lakewood's ordinance "on its face [permits] unbridled discretion and therefore an inherent threat of arbitrary decision making." *Id.* at 1146. The Sixth Circuit's opinion did not elaborate on how the newsrack regulation in *Gannett*, whose "only standard guiding employees who negotiate or issue licenses [for newsracks] is MTA's policy of maximizing its revenues" *Gannett*, 745 F.2d at 771, provides more limits on discretion by officials or is less of an inherent threat of arbitrary decision making than is the Lakewood ordinance.

As in *Gannett*, there has been no denial of a newsrack license here nor has Lakewood placed any unreasonably discriminatory terms upon the Appellee. Appellee's failure to seek a permit under the regulatory scheme provided by Appellant prevents the record from containing any evidence of the ordinance's unconstitutional application. Therefore, in accord with the Second Circuit's reasoning, no justiciable controversy exists.

CONCLUSION

For the foregoing reasons, it is urged that this Court reverse the decision of the Sixth Circuit Court of Appeals and uphold the Appellant City of Lakewood's ordinance as a constitutional exercise of the City's local police power to effectuate legitimate governmental interests.

Respectfully submitted,

ROGER F. CUTLER
City Attorney
100 City-County Bldg.
Salt Lake City, UT 84111

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, SC 29217

WILLIAM H. TAUBE
Corporation Counsel
of Chebanse
359 E. Hickory
P.O. Box 51
Kankakee, IL 60901

MARVA JONES BROOKS
City Attorney
Department of Law
1100 Omni International
Atlanta, GA 30335

WILLIAM I. THORNTON, JR.
City Attorney
101 City Hall
Durham, NC 27701

JOHN W. WITT
City Attorney
202 "C" Street
City Administration Bldg.
San Diego, CA 92101

ROBERT J. ALFTON
City Attorney
A-1700 Hennepin County
Government Center
Minneapolis, MN 55487

JAMES K. BAKER
City Attorney
600 City Hall
Birmingham, AL 35203

JOSEPH N. deRAISMES
City Attorney
P.O. Box 791
Boulder, CO 80306

FRANK B. GUMMEY, III
City Attorney
P.O. Box 551
Daytona Beach, FL 32015

DOUGLAS N. JEWETT
City Attorney
Municipal Building
Tenth Floor, Law Department
Seattle, WA 98104

ROBERT J. MANGLER
Corporation Counsel
1200 Wilmette Avenue
Wilmette, IL 60091

NEAL E. MCNEILL
City Attorney
200 Civic Center
Room 316
Tulsa, OK 74103

JOSEPH I. MULLIGAN
Corporation Counsel
615 City Hall
1 City Hall Square
Boston, MA 02201

ANALESIE MUNCY
City Attorney
1500 Marilla
Room 7DN
Dallas, TX 75201

DANTE R. PELLEGRINI
City Solicitor
313 City-County Building
Pittsburgh, PA 15219

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314, City Hall
Memphis, TN 38103

CHARLES S. RHYNE
Counsel of Record
JAN MAJEWSKI
RACHEL S. ULLMAN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5424

*Attorneys for National Institute
of Municipal Law Offices as
Amicus Curiae*

APPENDIX A**ATLANTA, GEORGIA,
CODE OF ORDINANCES (1978)****Section 14-11009 Hold harmless agreement.**

Every person or other entity which installs, places, or maintains a newspaper vending device on a public sidewalk in the city shall file a written statement with the clerk of council satisfactory to the city attorney whereby said person or entity agrees to indemnify and hold harmless the city, its officers, directors, and employees, from any loss of liability or damage, including expenses and costs, for bodily or personal injury, and for property damage sustained by any person as a result of the installation, placement or maintenance of a newspaper vending device within the city.

**BEVERLY HILLS, CALIFORNIA, MUNICIPAL
CODE (1976)****Sec. 6-7.08. Insurance.**

Prior to the issuance of a permit by the City Controller, the applicant shall furnish to the City Controller a certificate that the applicant has then in force public liability and property damage insurance, naming the City as an additional insured, in an amount not less than Three Hundred Thousand and no/100ths (\$300,000.00) Dollars minimum liability combined single limit (bodily injury and property damage) per person and per occurrence. The evidence of insurance filed with the City Controller shall include a statement by the insurance carrier that thirty (30) days' notice will be given to the City before any cancellation of coverage.

LAS VEGAS, NEVADA, MUNICIPAL CODE (1976)

13.24.030 Insurance. Every person or other entity which places or maintains a news rack on a public sidewalk or parkway in the City shall provide and keep in force during the time that such news rack is allowed to remain on public property, a policy of public liability insurance, naming the City as an additional insured, in an amount not less than one hundred thousand dollars combined single limit for any injury to persons and/or damage to property for reason of the installation, use and maintenance of such news rack or public property. Said policy shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without the City having been given thirty days prior written notice thereof by such carrier.

LINCOLN, NEBRASKA, MUNICIPAL CODE (1976)

14.57.090 Insurance and indemnification. The applicant shall at all times maintain a policy of liability insurance in a minimum amount of three hundred thousand dollars (\$300,000) for the injury or death of any number of persons per occurrence, and one hundred thousand dollars (\$100,000) for property damage per occurrence. Such coverage will name the city of Lincoln as an additional insured. All such policies and certificates of insurance shall be issued by companies authorized to do business in the state of Nebraska, and shall be approved as to form by the city attorney for the commencement of such use and shall provide that it cannot be cancelled until ten (10) days' written notice of such cancellation shall have been filed with the city clerk. Any termination or lapse of such insurance will automatically revoke any permit issued pursuant to this chapter.

NORTH KANSAS CITY, MISSOURI, CODE (1971)

Sec. 27-168. Hold-harmless agreement.

Every person or other entity which installs, places or maintains a newspaper vending device on a public sidewalk in the city shall file a written statement with the clerk of council satisfactory to the city council whereby said person or entity agrees to indemnify and hold-harmless the city, its officers, directors and employees from any loss or liability or damage, including expenses and costs, for bodily or personal injury and for property damage sustained by any person as a result of the installation, placement or maintenance of a newspaper vending device within the city.

PASADENA, CALIFORNIA, MUNICIPAL CODE
(1973)**12.08.080 Insurance required.**

Every person or other entity which places or maintains a news rack on a public sidewalk or parkway in the city shall provide and keep in force during the time that the news rack is allowed to remain on public property, a policy of public liability insurance, naming the city as an additional insured, in an amount not less than \$50,000 combined single limit for any injury to persons and/or damage to property by reason of the installation, use and maintenance of such news rack on public property. The policy shall provide that the insurance or coverage shall not be cancelled or reduced by the insurance carrier without the city having been given 30 days' prior written notice thereof of such carrier.

The policy or a certificate of insurance evidencing the requisite coverage shall be filed with the city clerk at the

same time as the indemnity agreement is filed pursuant to Section 12.08.070.

TUCSON, ARIZONA, CODE (1977)

Sec. 25-57.1(5). Terms and conditions. No license shall be issued except under the following terms and conditions:

* * *

(d) The applicant must maintain at all times public liability insurance in amounts not less than:

Public liability and bodily injury—Each person one hundred thousand dollars (\$100,000.00); each accident three hundred thousand dollars (\$300,000.00); and

Property damage, aggregate—Fifty thousand dollars (\$50,000.00);

to indemnify the city against all claims for damages which may result from the installation of newspaper vending machines. Satisfactory evidence of insurance shall be filed with the director of finance.

APPENDIX B

BEVERLY HILLS, CALIFORNIA, MUNICIPAL CODE (1975)

Sec. 10-3.3002. Architectural Commission.

An Architectural Commission is hereby established which shall consist of seven (7) members who shall be appointed by the Council. At least one of the members shall be appointed from each of the following disciplines: building construction, architecture, landscape architecture, and visual and graphic design, and at least three (3) members shall be lay persons. In the event no person is eligible for appointment in the designated field who is a resident of the City, the Council may waive the residency requirement.

BOCA RATON, FLORIDA, CODE OF ORDINANCES (1977)

Sec. 2-236. Creation, members, terms, appointment.

A community appearance board is hereby created. The board shall be composed of five (5) members, appointed by the council for terms of two (2) years, except that the members of the first board to serve shall be appointed so that three (3) members shall serve one-year terms and two (2) members shall serve two-year terms. Their successors shall be appointed to two-year terms. Two (2) alternate members shall be appointed by the city council for terms of one year. In the absence or disability of a regular member, an alternate member may be called to sit and act in his place by the chairman of the board. Whenever feasible, one of the two (2) alternates shall be a registered architect.

**CARMEL-BY-THE-SEA, CALIFORNIA,
MUNICIPAL CODE (1973)**

1322.2. Design Review Board. The Planning Commission, or a committee of Commission members appointed by the Commission, shall be the Design Review Board. A Design Review Committee may review plans prior to presentation to the Design Review Board.

**HUNTINGTON BEACH, CALIFORNIA,
MUNICIPAL CODE (1975)**

S. 9850 Design Review Board Established. There is hereby created a Design Review Board for the City of Huntington Beach referred to in this article as "Board."

LAS VEGAS, NEVADA, MUNICIPAL CODE (1974)

Aesthetic Review

19.66.010 Required when. Aesthetic review shall be required prior to issuance of a building permit for any building, structure, or other improvement except single-family homes, residential accessory buildings, signs, and other properties for which an approved plot plan already exists.

**SHOREWOOD, WISCONSIN, GENERAL
ORDINANCE (1984)**

Section 9-207 Building and Aesthetics Board

A. Membership. The Building and Aesthetics Board shall consist of 9 members, to be appointed by the Village President with the approval of the Village Board, all of whom shall serve without compensation.

1. The membership shall include 3 architects who shall reside in the Village of Shorewood.

2. Six additional members shall be residents of the Village.
3. The Village Manager, Attorney and Planner shall be ex-officio nonvoting members.
4. Members of the Board shall elect their own chairman and adopt such rules as the membership deems advisable, but which shall not conflict with the provisions of this section.
5. All appointments shall be for staggered terms of 3 years. Any vacancy shall be for the unexpired term or as original appointments. Members shall serve until their successors have been appointed.

**STOCKTON, CALIFORNIA, MUNICIPAL
CODE (1964)**

Sec. 16-091.2 Approval of Plans:

It is hereby declared that the City Council may require that applicants for building permits for any construction in any area of the City shall submit drawings of exterior elevations of the proposed building or structure, whether new or to be remodeled, for transmittal by the Superintendent of Building Safety to the Planning Commission for a review; the purposes and regulations for such action being as herein set forth, and the regulations to be applicable after the determination of said area as herein set forth.

**WALNUT CREEK, CALIFORNIA,
MUNICIPAL CODE (1973)**

Sec. 10-4.201. Powers of the Design Review Commission.

A Design Review Commission is hereby established for the purpose of investigating the design, layout and other features of proposed developments in keeping with the intent and purposes set forth in Section 10-4.101.

AMICUS CURIAE

BRIEF

JUL 17 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAKEWOOD,

Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION; AMERICAN CITY BUSINESS
JOURNALS, INC.; THE COPLEY PRESS, INC.; DONREY, INC.;
DOW JONES & COMPANY, INC.; GANNETT CO., INC.; GLOBE
NEWSPAPER COMPANY; THE HEARST CORPORATION; THE
MINNEAPOLIS STAR & TRIBUNE; THE NEW YORK DAILY
NEWS; THE NEW YORK TIMES COMPANY; OTTAWAY
NEWSPAPERS, INC.; PHILADELPHIA NEWSPAPERS, INC.;
PULITZER PUBLISHING COMPANY; THE TIMES MIRROR
COMPANY; TRIBUNE COMPANY; AND THE WASHINGTON POST
COMPANY IN SUPPORT OF AFFIRMANCE**

NIXON, HARGRAVE, DEVANS & DOYLE

Robb M. Jones (Counsel of Record)

Robert C. Bernius

One Thomas Circle, N.W.

Washington, D.C. 20005

(202) 223-7200

ATTORNEYS FOR AMICI CURIAE

38 PP

ATTORNEYS FOR AMICI CURIAE

W. Terry Maguire
Tonda F. Rush
American Newspaper Publishers
Association

Box 17407 Dulles Airport
Washington, DC 20041

Carol M. Patterson
American City Business Journals, Inc.
3535 Broadway
Kansas City, MO 64111

Harold W. Fuson, Jr.
Copley Newspapers
7776 Ivanhoe Avenue
La Jolla, CA 92038

George O. Kleier
David Olive
Donrey Media Group
920 Rodgers Avenue
Fort Smith, AR 72901

James A. Scaduto
Dow Jones & Company, Inc.
P.O. Box 300
Princeton, NJ 08543

Alice Neff Lucan
Gannett Co., Inc.
Box 7858
Washington, D.C. 20044

Catherine E. C. Henn
Globe Newspaper Company
135 Morrissey Boulevard
Boston, MA 02107

Michael Frascati
The Hearst Corporation
959 Eighth Avenue
New York, NY 10019

Norton L. Armour
Minneapolis Star-Tribune
425 Portland Avenue
Minneapolis, MN 55488

Marjorie T. Coleman
The New York Daily News
2220 East 42nd Street
New York, NY 10017

George Freeman
Kenneth A. Richieri
The New York Times Company
229 West 43rd Street
New York, NY 10036

Peter G. Stone
Ottaway Newspapers, Inc.
P.O. Box 401
Campbell Hall, NY 10916

Joseph D. Priory
Philadelphia Newspapers, Inc.
400 North Broad Street
Philadelphia, PA 19101

Lawrence W. Boes
Reavis & McGrath
For Pulitzer Publishing
Company
345 Park Avenue
New York, NY 10154

William Niese
Ronda Heth
The Times Mirror Company
Times Mirror Square
Los Angeles, CA 90053

Joseph P. Thornton
Tribune Company
435 North Michigan Avenue
Chicago, IL 60611

Boisfeuillet Jones, Jr.
Andrew S. Rosen
The Washington Post Company
1150 15th Street, N.W.
Washington, D.C. 20071

QUESTIONS PRESENTED

1. Whether the First Amendment protects the right to distribute newspapers on public streets and sidewalks through coin-operated machines ("newsracks"), subject only to reasonable time, place and manner restrictions, or whether a municipality may totally ban the placement of newsracks on public streets and sidewalks.

2. Whether the City of Lakewood's ordinance regulating newsracks is facially invalid under the First Amendment for any of the following reasons:

(a) because it delegates to the Mayor complete discretion to determine "terms and conditions deemed necessary and reasonable" for the grant or denial of permits for the placement of newsracks alongside public streets and sidewalks;

(b) because it delegates to the Lakewood's Architectural Review Board complete discretion to grant or deny a license based upon its approval or disapproval of newsrack design;

(c) because it conditions the grant of a license on the prior satisfaction of an indemnification requirement.

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<i>New Times, Inc. v. Arizona Board of Regents</i> , 110 Ariz. 367, 519 P.2d 169 (Ariz. 1974)	8
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	13
<i>Passaic Daily News v. City of Clifton</i> , 200 N.J. Super. 468, 491 A.2d 808 (N.J. Super. Ct. Law Div. 1985)	8
<i>Philadelphia Newspapers, Inc. v. Borough Council</i> , 381 F. Supp. 228 (E.D. Pa. 1974)	8, 12, 19
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<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	27
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<i>Southern New Jersey Newspapers, Inc. v. New Jersey Department of Transportation</i> , 542 F. Supp. 173 (D.N.J. 1982)	8, 22
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	27
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	8, 20
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	22
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Belden Associates, <i>Sizing Up the Single Copy Customer: Working Guidelines for Newspaper Management</i> (Dec. 1984)	16
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In The

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAKEWOOD,

Appellant,

vs.

PLAIN DEALER PUBLISHING CO.,

Appellee.

PRELIMINARY STATEMENT

Amici submit this brief in support of appellant Plain Dealer Company and urge affirmance of the court below.¹ *Amici* represent the whole spectrum of newspaper companies in the United States. On an average day, their newspapers circulate to more than 56 million readers. Altogether, *amici* distribute newspapers through more than a half million newspaper vending machines ("newsracks") nationwide.

Newsracks do not stand in a peripheral corner of First Amendment concern. As a result of changed lifestyles and readership habits, newsracks have become a vital link between publishers and readers. More newspaper readers rely on "single-copy" purchases, as opposed to home-delivered newspaper subscriptions, than ever before. Without newsracks on the public streets and sidewalks, millions of readers would lack effective access to *amici's* publications.

¹ Under Supreme Court Rule 36, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

More and more municipalities have considered and enacted ordinances restricting newsracks. Few have gone so far as the City of Lakewood in its faintly disguised desire to ban them altogether. All, however, will look to this Court's decision for guidance on the scope of permissible regulation. Appellant Lakewood's arguments, if accepted, would allow municipalities across the nation to ban a uniquely valuable and important form of communication for superficial, subjective and sometimes pretextual reasons. By banning newsracks on public streets and sidewalks, appellant would also have this Court discard a tradition of newspaper distribution as old as our nation itself.

Amici therefore ask the Court to confirm that newsracks share the First Amendment protection traditionally accorded to newspaper distribution on public streets and sidewalks, subject only to narrowly tailored time, place and manner restrictions necessary to advance the legitimate and compelling interests of municipal governments.

INTEREST OF THE AMICI CURIAE

The AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION ("ANPA") is a national trade association representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately 90% of the nation's total daily and Sunday newspaper circulation and a substantial portion of its weekly newspaper circulation. Because newsracks are a vital means of distribution to those who might not otherwise receive a newspaper, all of ANPA's members have a keen interest in laws and court decisions pertaining to newspaper distribution.

GANNETT CO., INC. publishes 90 daily and 39 non-daily newspapers. The total circulation of the 90 daily newspapers is 6.1 million readers, including the five-year old national newspaper, *USA TODAY*, which circulates an average of 1,544,547 newspapers daily. Twenty-six percent, or about 400,000 of *USA TODAY*'s newspapers, are obtained from newsracks on a daily basis.

PULITZER PUBLISHING COMPANY owns *The Arizona Daily Star* and the *St. Louis Post-Dispatch*. For the *Post-Dispatch*, 15.9% of its 357,312 average daily circulation is sold through newsracks.

THE TIMES MIRROR COMPANY publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1,127,000 daily and more than 1.4 million on Sunday. Times Mirror also publishes eight other newspapers including *Newsday*, the *Baltimore Sun*, the *Denver Post*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

THE WASHINGTON POST COMPANY publishes *The Washington Post* and one other daily newspaper, the *Everett Herald* of Everett, Washington. Approximately 60,000 of the *Post*'s average 796,659 daily sales are through newsracks.

The TRIBUNE COMPANY publishes *The Chicago Tribune* and six other daily newspapers, with a total daily circulation of 2,736,242. Of *The Chicago Tribune*'s 758,464 daily circulation, 103,000, or 13.6%, are sold through newsracks.

THE NEW YORK TIMES COMPANY publishes *The New York Times* and 32 other daily or weekly newspapers. Of the *Times*' 1,056,924 daily circulation, approximately 70,000 newspapers are sold daily through newsracks. The *New York Times* placed seven newsracks in the City of Lakewood in 1984. Three days after placement, the newsracks — and the newspapers in them — were seized by city authorities. Lakewood subsequently charged the newspaper with 42 criminal counts. That criminal prosecution remains pending.

GLOBE NEWSPAPER COMPANY, a subsidiary of Affiliated Publications, Inc., publishes *The Boston Globe*. Although the newspaper does not calculate total newsrack sales, it regards them as an important means of distribution in the Boston metropolitan area.

THE COPLEY PRESS, INC. publishes 12 daily newspapers in California and Illinois, whose combined circulation is nearly 750,000. It also operates a news service serving 1500 daily and weekly newspaper clients. Its member newspapers regard newsracks as a vital link between publisher and reader.

AMERICAN CITY BUSINESS JOURNALS, INC., a recently formed company, publishes 35 business and legal journals in 35 cities across the nation.

Because many of its newspapers are new publications, it has found newsrack sales necessary as a means of introducing new readers and establishing an audience.

THE NEW YORK DAILY NEWS, one of the largest metropolitan newspapers in the United States with a daily average circulation of 1,278,118, finds newsracks an important means of reaching its readership in the New York metropolitan area, many of whom are not subscribers because home delivery is not available or because of personal preference.

THE MINNEAPOLIS STAR & TRIBUNE is a newspaper published in Minneapolis, Minnesota with a daily circulation of 382,832 and a Sunday circulation of 625,504.

PHILADELPHIA NEWSPAPERS, INC., a subsidiary of Knight-Ridder, Inc., publishes two newspapers in Philadelphia, *The Philadelphia Inquirer* and *The Daily News*, with daily average circulation, respectively, of 494,844 and 150,000. Of the *Inquirer's* daily circulation, approximately 12% is sold through newsracks.

THE HEARST CORPORATION, directly or through its affiliates, publishes 15 daily and Sunday newspapers with approximate average daily circulation of 1.5 million and Sunday circulation of 2.5 million, all of which have a substantial portion of their circulation sold through newsracks. For example, the *Los Angeles Herald Examiner* distributes over 50% of its 245,000 daily average circulation and the *San Francisco Examiner* distributes over 33% of its 150,000 daily average circulation through newsracks.

DONREY, INC, through subsidiary corporations doing business as Donrey Media Group, publishes 57 daily newspapers and 73 non-daily newspapers in 21 states. Donrey does not keep separate figures for newsracks, but single-copy sales of its newspapers range from 3.5% to 50% of their circulation. Many of those sales are made through newsracks.

DOW JONES & COMPANY, INC. publishes *The Wall Street Journal* and *Barron's National Business and Financial Weekly*, with circulation of

2,026,276 and 280,370 copies, respectively. Every day, approximately 100,000 copies of *The Wall Street Journal* are sold through newsracks. OTTAWAY NEWSPAPERS, INC., a subsidiary of Dow Jones, publishes a group of 22 newspapers in 11 states, with a total average daily circulation of 550,000.

SUMMARY OF ARGUMENT

This Court has the task of balancing an increasingly important medium of expression against the claimed governmental interests of a local municipality. In doing so, the Court considers newsrack distribution for the first time. It does not, however, write on a clean slate. This Court has consistently protected distribution of information as one of the central concerns of the First Amendment. Newsracks may be a relatively recent development, but they remain essentially a means of distributing newspapers on the public streets and sidewalks, an activity with a worthy pedigree and a tradition of protection under the Constitution. This tradition, and the uniqueness and importance of newsracks, overcome the minimal aesthetic costs and *de minimis* impact on public safety that newsracks may create.

This case comes before the Court in the posture of an ordinance struck down by the Sixth Circuit because on its face it did not constitute a valid time, place and manner regulation. 794 F.2d at 1144. Appellant Lakewood, however, does not focus its efforts on upholding the ordinance's terms. Rather, it contends that the ordinance, enacted only after appellee *The Plain Dealer's* litigation commenced, was unnecessary in the first instance. In its zeal to portray newsracks as a substantive evil, it seeks a declaration that newsracks deserve no First Amendment protection and can be banned from the streets and sidewalks of Lakewood.

Amici wish to clarify, therefore, the issues that this appeal does and does not present. This case represents a facial challenge to an ordinance regulating newsracks that Lakewood concedes it would repeal in a minute and ban newsracks entirely, should it be given the least bit of encouragement. The Sixth Circuit, based upon a long line of precedent, struck down the ordinance because it delegated to municipal authorities unguided discretion to approve or disapprove newsracks. The Sixth Circuit held that this defect was "inherently inconsistent with a valid time, place and manner regulation." 794 F.2d at 1145. The

case does not, however, present the specific *application* of reasonable time, place and manner regulations to newsracks, nor does it present the legitimacy of aesthetic and public safety goals as compelling governmental interests.²

If facial validity were the only issue raised by appellant, *amici* would urge the Court simply to follow well-established precedent and uphold the Sixth Circuit's decision, as Lakewood's ordinance improperly gives its municipal officers standardless discretion to ban newsracks for any variety of reasons. By making a broader attack on the underpinnings of the Sixth Circuit decision, however, appellant is inviting the Court to consider whether there is any First Amendment protection for the placement of newsracks on public streets.

Therefore, *amici* will demonstrate that protection for the publication of newspapers cannot be divorced from the right to circulate them. This Court's precedents have long recognized this truism. Second, history shows that there exists a traditional right of access to the public streets and sidewalks for newspaper distribution. Unlike commercial billboards or the posting of signs on utility poles, distribution of newspapers stands at the core of activities traditionally protected in a public forum. Third, the importance of newsracks to contemporary newspaper circulation establishes that newsracks are a uniquely valuable means of communication and that satisfactory substitutes do not exist. Lifestyles, economic dictates, and public demand have evolved to the point where substantial numbers of readers require access to newsracks for their daily newspapers. Finally, based upon the minimal impact that newsracks have on the public's ability to use streets and sidewalks, as well as the compatibility of aesthetic and safety goals with less restrictive regulation, a total ban should be rejected. Full constitutional protection should be confirmed. This status then compels affirmance of the court

² Two other aspects of the Sixth Circuit's decision have not been presented to this Court for review. First, the court below, without any discussion, upheld a \$10 per newsrack annual "rental fee". 794 F.2d at 1143, n.2. Although *amici* believe that such revenue raising fees are unconstitutional (*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 586 [1983]), they urge that any consideration and discussion of this issue await full factual development in a later case. Second, the court below, again without extensive analysis, upheld Lakewood's ban on newsracks in "residential" areas. 794 F.2d at 1147. *Amici* strongly believe that such a ban reaches too far, but agree that the issue has not been preserved for the Court's review.

below on the narrow ground that Lakewood's ordinance does not meet the procedural standards necessary for a valid time, place, and manner regulation.

ARGUMENT

POINT I

NEWSRACKS ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The right to distribute the news is indispensable to the freedom of the press, and is fully protected by the First Amendment:

Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.

In re Jackson, 96 U.S. 727, 733 (1878). The right to distribute finds support not only in the newspapers' right of publication, but also in the public's right to receive information from newspapers. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). Constitutional protection is undiminished by the fact that a newspaper is sold, rather than given away. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Amici accomplish their newspaper circulation in significant part through newsracks. Although once the "newsboy" was the principal means of single-copy newspaper distribution, newsracks have largely replaced the human vendor. In many areas they have replaced home delivery as well. The decline in the number of alternative newspaper outlets, coupled with the efficiency of newsracks, has made them a vital part of distributing the news. *Amici*, both established newspapers and newspapers attempting to serve readers' increasing demands for a second newspaper, rely heavily on newsrack distribution.

That newsracks have no pulse or voice do not diminish their importance to the process of circulation. Nor should that fact somehow disqualify them from constitutional protection. Newsracks are the contemporary evolution of the news-

boy, and have become a key means by which the news is widely disseminated in society. They also ensure convenient, inexpensive and orderly access to the news. These facts have resulted, as it did in the Court below, in the application of "full constitutional protection" for newsracks in every case which to *amici's* knowledge has addressed the issue.¹

Full constitutional protection should be confirmed by this Court as well. This conclusion requires a far stricter scrutiny of a municipality's actions than the deferential analysis urged by Lakewood. See Appellant's Brief at 29. Placement of newsracks on public streets and sidewalks may be abridged only under narrowly tailored circumstances that are not present here. Public streets and sidewalks are a traditional public forum. *Hague v. Committee for Industrial Organi-*

¹ The protection is tempered, in virtually every instance, by the recognition that reasonable time, place and manner regulations are permissible. Lakewood would have this Court disregard the uniform precedent in the lower courts and uphold a municipality's right to ban newsracks from its public streets and sidewalks. *Jacobsen v. United States Postal Service*, 812 F.2d 1151 (9th Cir. 1987); *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984); *Providence Journal Co. v. City of Newport*, No. 86-0320 (D.R.I. June 12, 1987); *Gannett Satellite Information Network, Inc. v. Town of Norwood*, 579 F. Supp. 108 (D. Mass. 1984); *Southern Connecticut Newspapers, Inc. v. Town of Greenwich*, 11 Med. Rep. (BNA) 1051 (D. Conn. 1984); *Gannett Satellite Information Network, Inc. v. City of Malden*, 9 Med. L. Rep. (BNA) 2556 (D. Mass. 1983); *Miller Newspapers, Inc. v. City of Keene*, 546 F. Supp. 831 (D. N.H. 1982); *Southern New Jersey Newspapers v. State of New Jersey Department of Transportation*, 542 F. Supp. 173, 183 (D.N.J. 1982); *Redd v. Davison*, 7 Med. L. Rep. (BNA) 1142 (E.D. Mich. 1981); *Westchester Rockland Newspapers, Inc. v. Village of Briarcliff Manor*, 5 Med. L. Rep. (BNA) 1696 (S.D.N.Y. 1979); *Westchester Rockland Newspapers v. City of Yonkers*, 5 Med. L. Rep. (BNA) 1777 (S.D.N.Y. 1979); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974); *New Times, Inc. v. Arizona Board of Regents*, 110 Ariz. 367, 519 P.2d 169 (Ariz. 1974); *Kash Enterprises v. City of Los Angeles*, 19 Cal. 3d 294, 138 Cal. Rptr. 562 P.2d 1302 (Cal. 1977); *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 155 Cal. Rptr. 435 (Cal. Ct. App. 1979); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Cal. Ct. App. 1975); *California Newspaper Publishers Association v. City of Burbank*, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (Cal. Ct. App. 1975); *Minnesota Newspaper Association, Inc. v. City of Minneapolis*, 9 Med. L. Rep. (BNA) 2116 (Minn. Dist. Ct. 1983); *News Printing Co. v. Borough of Totowa*, 211 N.J. Super. 121, 511 A.2d 139 (N.J. Super. Ct. Law Div. 1986); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J. Super. Ct. Law Div. 1985); *City of New York v. American School Publications, Inc.*, 69 N.Y.2d 576; *Gannett Co. v. City of Rochester*, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (N.Y. Sup. Ct. 1972).

zation, 307 U.S. 496, 515-16 (1939)(opinion of Roberts, J.). "Traditional public forum property occupies a special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983). Moreover, "[t]he right to distribute newspapers and other periodicals on the public street lies at the heart of our constitutional guarantees of freedom of speech and freedom of press." *Kash Enterprises v. City of Los Angeles*, 19 Cal. 3d 294, 138 Cal. Rptr. 53, 562 P.2d 1302, 1306 (Cal. 1977). This right has been given protection for over two centuries.

A. A Traditional Right of Access Exists to Distribute Newspapers on Public Streets and Sidewalks.

A traditional right of access to the public streets and sidewalks, for the purpose of distributing newspapers, antedates the Constitution. Newsracks and their precursors occupy an important role in that tradition. The origins of modern newsracks go back to ancient Rome, where scribes recorded the news of the day and posted it in public places. The posting was designed to entice the reader to digest information about the activities of the Roman Senate and other items of community interest. Newspapers use headlines for the same purpose and newsracks, with their display windows, likewise perform the age-old posting function.

Posting of the news began in the United States during the early nineteenth century. By 1815, the *New York Mercantile Advertiser* and the *New York Gazette* were posting news on boards nailed to their office doors. Other papers soon followed their example, and the public "bulletin board" became an important part of American journalism.⁴

Even before public posting became prevalent, newspaper distribution on the streets was an established practice. When the first newspapers were established in America, the printer's apprentice often sold copies on the street.⁵ By 1750, the sales were more formalized, as men and young boys would buy newspapers from

⁴ J. Lee, *History of American Journalism* 159 (rev. ed. 1923).

⁵ Whisnant, *Selling the Gospel News, Or: The Strange Career of Jimmy Brown the Newsboy*, 5 J. Soc. Hist. 269, 273 (1972).

printers at discounted prices and then resell them to the public.⁶ So-called "newsboys" also aided in the distribution of patriotic literature during the Revolution.⁷

The practice of selling newspapers on the public streets became more widespread during the 1830's with the development of a popular or "penny press." Popular access to the news began modern journalism and went hand in hand with the growth of literacy and the spread of democracy in Jacksonian America. Unlike the established newspapers of the day, which were sold almost entirely by subscription, the penny papers relied on street sales for the bulk of their distribution. Their price and content were directed at the common people, not just the elites.⁸

The last part of the nineteenth century saw increased use of the streets for newspaper distribution and the birth of a new breed of newsboy. Before motorized transportation would revolutionize newspaper distribution, street hawkers were essential to the success of newspapers of every size.⁹ Although there is no reliable way to estimate their numbers, from all accounts there were huge numbers of "newsies" in every sizeable city.¹⁰ In the larger cities, hawkers would place themselves outside department store exits, in front of subway stations, by commuter train stops, wherever they could be sure to meet with homebound

⁶ F. Mott, *American Journalism: A History 1690-1960* 106 (3d ed. 1967).

⁷ A. Lee, *The Daily Newspaper in America: The Evolution of a Social Instrument* 26 (1937).

⁸ M. Schudson, *Discovering the News: A Social History of American Newspapers* 22 (1981).

⁹ D. Nasaw, *Children of the City* 168 (1985).

¹⁰ See *id.* at 69-71; L. Ashby, *Saving the Waifs: Reformers and Dependent Children, 1890-1917* 253 n.4 (1984).

workers.¹¹ In smaller cities, vendors hawked their papers along the main business streets.¹² In the words of one historian, "In those helter-skelter days of journalism between the Spanish-American War and World War I, the newsies shouting the headlines were as much a part of the urban scene as the lampposts on every corner."¹³

Newboys' shouts are now a memory in most American cities.¹⁴ Television and radio usually replaced the "extra" as the source of fast-breaking news. Juvenile street hawkers gradually disappeared as child labor and compulsory education laws became widespread, and advances in distribution methods made single copy sales decrease in comparison to subscription sales. Where single copy sales remained important, human sellers were replaced by so-called "mechanical newsboys," or newsracks. Newsracks combined attributes of both the human vendor and the bulletin board. They made the news available to those travelling public streets, both to those who wanted to buy a newspaper and to those who merely wished to scan headlines.

The newsrack concept originated when, ever enterprising, some newsboys decided to escape the winter cold by hanging their bags of newspapers on lampposts and trusting readers to pay for their papers. This practice became so prevalent that sometimes the bags were modified to include a separate compartment for coins. The first newsrack was used on the streets of Seattle in 1892.¹⁵ Histories do

¹¹ Commuting time is an almost perfect time for people to read their newspapers, at either end of the day. If newsboys worked the City of Lakewood, they would be seen at the 19 bus stops on Clifton Boulevard, a major commuter route bringing the residents of Lakewood into downtown Cleveland to work. Indeed the *Plain Dealer* had chosen to place eight newsracks along Clifton Boulevard (JA 231), where "rush-hour" buses are scheduled to stop every five minutes. The rest of the *Plain Dealer's* eight newsracks would have been placed along two other parallel "commuter" boulevards in Lakewood. (*Id.*) Amici, who lack the home delivery base in Cleveland that *The Plain Dealer* has, would rely almost entirely on newsracks for their distribution to these commuters, since it is unrealistic to expect a commuter hurrying to the bus-stop to detour to a 24-hour newsstand.

¹² D. Nasaw, *supra* note 9, at 75-76.

¹³ *Id.* at 78.

¹⁴ W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News* 273 (1987).

¹⁵ A. Lee, *supra* note 7, at 300.

not describe its form, but soon these so-called "honor racks" replaced the bags. These were little more than wire racks with an attached coin tube. By the 1940's, wire racks selling local dailies became common on city streets.¹⁶ The first coin-operated newsrack mechanism was developed in the 1940's, but proved impractical because each newspaper had to be rolled, encased in a metal ring, and then loaded into the machine.¹⁷ The semi-automatic box was invented in 1957 after a newspaper circulation manager had complained that patrons were stealing papers from the honor racks.¹⁸ The new machine had a coin mechanism and pull-down door, which opened only after proper coins were deposited. The honor system continued to play a part, as the whole stack of papers was exposed each time coins were deposited. These semi-automatic newsracks began to replace honor racks thirty to thirty-five years ago and continue to be the most common newsrack on the streets today.¹⁹

B. Newsracks Are a Uniquely Valuable and Important Mode of Communication.

The tradition of using the streets for newspaper distribution has evolved to the point where newsracks have almost completely supplanted other forms of distribution on the public streets and sidewalks. A recent study shows that 96% of North American newspaper publishers use newsracks, and that more than 633,000 newsracks exist in the United States and Canada.²⁰ One study reported that more than three-fourths of non-subscribers who buy newspapers occasionally get them from newsracks.²¹ Newsracks are a unique form of newspaper distribution. For newspaper readers, they provide the flexibility, convenience and speed not available through home subscription or retail stores. Newsracks are

¹⁶ *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228, 235 (E.D. Pa. 1974) (Philadelphia); *Gannett Co. v. City of Rochester*, 69 Misc. 2d 619, 623, 330 N.Y.S.2d 648 (N.Y. Sup. Ct. 1972) (Rochester, N.Y.).

¹⁷ *ICMA Survey Views Newsracks*, ICMA Update 12 (Nov. 1983).

¹⁸ *It's the 30th Birthday of Coin Operated Newsracks*, *Presstime* 32 (Feb. 1987).

¹⁹ *Id.*

²⁰ W. Thorn & M. Pfeil, *supra* note 14, at 276; Newspaper Advertising Bureau, Inc., *Sales and the Single Copy* 7 (Feb. 1983).

²¹ W. Thorn & M. Pfeil, *supra* note 14, at 276.

available at all hours, in a variety of locations, and they do not require any wait for service. Moreover, they offer a spontaneous reminder that important events are occurring which a well-informed citizen should be aware of. For newspaper publishers, newsracks enable distribution to occur far from areas where home delivery is feasible and in numbers smaller than would interest the private retail outlet. They allow the greatest number of readers to be reached with the greatest efficiency and autonomy.

These attributes of newsracks have become crucial in the 1980's. Different demands for information now exist. This has led to the development of new publications and the wider circulation of others. New newspapers have reached out to readers by presenting information in the editorial form that readers want. Existing newspapers have reached out to new readers by expanding distribution to where readers need it. These developments should be encouraged by a First Amendment balance that promotes free and open newspaper distribution on public streets and sidewalks, for at the center of the First Amendment stands the proposition that an informed electorate can best make intelligent choices when presented with the widest array of information from diverse sources. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). Accord, T. E. Emerson, *Toward A General Theory of the First Amendment* 7-11 (1966). Fostering and preserving those diverse sources depends critically upon newsrack distribution on public streets and sidewalks.

Most American readers now have access to more than one newspaper, even though fewer cities feature competing daily newspapers. Lack of access to more than one local daily has been overcome by three developments: more widespread distribution of metropolitan newspapers, the rise of the national newspaper, and the growth of suburban newspapers. All are distributed in important part by newsracks. In any given area, readers may now have their choice of 1) a metro-

politan newspaper; 2) a national newspaper; 3) a suburban or local newspaper; and 4) a specialty newspaper.²²

Metropolitan newspapers are those published in major U.S. cities. Typically their major circulation is through home delivery, but most major city newspapers now reach beyond their traditional home delivery areas, even to communities within their regions which have daily newspapers. For example, the *Detroit Free Press* sells more than 125,000 newspapers daily beyond the six-county Detroit metropolitan area; the majority are through single copy sales.

Satellite technology has created genuinely national newspapers by greatly expanding their ability to reach distant markets with timely news. *The Wall Street Journal*, *The New York Times*, and *USA TODAY* use satellite-fed plants to print their newspapers all over the country. For example, *The Wall Street Journal* and *The New York Times* are printed, respectively, at 17 and 8 sites throughout the United States, making them quickly available to readers thousands of miles from the newspapers' editorial offices in New York. Similarly, *USA TODAY* is printed at 30 sites nationwide, making it a potential morning newspaper, alongside hometown dailies, for 80% of the nation's population.

Expanding information and reader needs have also led to the rise of suburban and specialty papers with their focus on readers' home communities or specialized interests. In 1960 there were about 600 suburban dailies and weeklies; cur-

²² This has dramatically changed the circumstances noted by the Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249-50 (1974), which cited commentators' conclusions about the public's diminishing access to competing newspapers. For example, one commentator wrote twenty-five years ago that "American cities with a competing newspaper will soon be as rare as those with two telephone systems." See A.J. Leibling, *The Press* 32 (1961). Leibling further found that lack of access to out-of-town newspapers compounded the problem:

In any American city that I know of, to pick up a paper published elsewhere means that you have to go to an out-of-town newsstand, unless you are in a small city that is directly within the circulation zone of a larger one. Even in New York, the out-of-town newsstands are few and hard to find. The papers are naturally, late; they cost more; and most people would use up a sizeable part of every day just travelling to get one. In smaller cities, such stands are even fewer — I know of only one in New Orleans — and in really small places they don't exist.

Id. at 32-33. *Amici* submit that the situation since 1961 has changed, but primarily because of new technology and the extensive use of newsracks for distribution.

rently, there are between 1800 and 1900 suburban newspapers circulating to approximately 24 million readers. According to Suburban Newspapers of America, newsracks sales vary widely. For the five *Journal* newspapers serving the Washington, D.C. metropolitan area, for example, an average of 3300 newspapers are sold daily through newsracks.

This resurgence of competing newspaper voices was made possible by an evolution of newspaper distribution. Readership patterns and changing demographics have shifted distribution techniques back to their traditional roots — the public streets and sidewalks. This has occurred because more and more readers have turned to single-copy purchases, as opposed to obtaining their newspapers from home subscription. Readers have done so for varied reasons, with access, convenience, and flexibility being chief among them.

One of the reasons is the increasing tendency of readers to read more than one newspaper. For example, in a 1983 survey done by The Newspaper Advertising Bureau, the results showed that 13% of the people contacted had read two newspapers the day before.²³ In June 1987, in a survey completed for this brief, that percentage had doubled — 27% of the people contacted had read a second newspaper the day before and fully 63% had read a second newspaper at least once in the six weekdays prior to the survey call.²⁴ This survey shows that a majority of the nation's adult population with residential telephones are reading two different newspapers during the course of a week. The clear implication — most of them get their second newspaper by purchasing it directly, not by subscription. Single-copy sales have thus become the most important means of circulation for newspapers seeking to become a "second read," as well as for those readers who, because of choice or lack of opportunity, do not have home delivery.²⁵ This devel-

²³ Newspaper Advertising Bureau, Inc., *Sales and the Single Copy* 7 (1983).

²⁴ See Gordon S. Black Corporation Telephone Survey of a randomly selected representative sample of 1610 adults with residential telephones, conducted June of 1987, to be filed with the Library of Congress. The study has a margin of sampling error of plus or minus 2.5 percent.

²⁵ Daily home delivery falls below the 50% mark for a number of demographic groups, including blacks, those with family incomes below \$10,000, the unmarried, renters, and those under 30. See Newspaper Advertising Bureau, Inc., *Circulation and Home Delivery Patterns* (Nov. 1983).

opment has reversed newspapers' historical emphasis on home subscriptions, and in doing so has raised newsracks to paramount importance, because they are critical to single-copy sales.

Readers' preferences are the key to understanding single-copy circulation's growing importance. The critical factor is flexibility. Readers can decide on a daily basis whether they have time to read, whether they have the money to buy a particular newspaper, or whether they want to read what a newspaper has to offer on a particular day.²⁶ These changing reading habits derive from changed American lifestyles. People tend to perceive themselves as busier than ever and surveys show that some feel they do not need a newspaper every day.²⁷ In some cases, people live outside a newspaper's home delivery area. For example, in Chicago, home delivery is unavailable to half of the city. Others live in types of housing where home delivery is impractical or unavailable. A recent survey disclosed that only 21% of residents in apartment buildings with five or fewer stories and only 2% of those in buildings with six or more stories have daily home delivery.²⁸

Other factors also contribute to the renewed emphasis on single-copy distribution. Frequent travelers, because of concerns about security, dislike having papers piled up on their doorsteps signalling their absence. Urban commuters find it easier to purchase a newspaper at or on the way to public transit stations, or prefer a later edition than they can get by home delivery. For others, who do not read the newspaper every day, single-copy purchasing is more efficient and best meets their budget constraints. Some buy the newspaper only on Wednesdays, when food coupons are included; on Fridays, for the weekend entertainment section; or daily, depending on which alternative publication they wish to read. For these buyers, the convenience of home subscription (when it is available) does not offset the flexibility of choosing when and what newspaper to buy.²⁹

²⁶ W. Thorn & M. Pfeil, *supra* note 14, at 271-72; Belden Associates, *Sizing Up the Single Copy Customer: Working Guidelines for Newspaper Management*, 6, 7 (Dec. 1984).

²⁷ See American Newspaper Publishers Association, *Executive Summary: Creative Marketing Strategies I* (Oct. 1986).

²⁸ W. Thorn & M. Pfeil, *supra* note 14, at 271. A major cause here is landlords' or tenants' reluctance to grant newspaper carriers access to their secured buildings.

²⁹ *Id.* at 271; *Single Copy Sales*, *Presstime* 6 (July 1984).

Finally, some readers buy only when newsworthy events draw their attention. Compelling news leads directly to intense reader interest and increased single-copy sales. For example, *USA TODAY* sold 316,631 more copies the day after the *Challenger* tragedy than had been sold on the same day the week before. Most of *amici's* newspapers increase their next-day sales after national or local elections; *The Washington Post's* sales increased 33,000 the day after the 1984 presidential election. Sports events have the same impact. The 1987 Leonard/Hagler fight led to a 26% next-day increase in sales of *amicus* Donrey Media Group's *Las Vegas Review-Journal*. All those additional readers purchased the newspapers through single-copy sales, often because the newspaper was available at a newsrack.

The significance of single-copy newspaper sales is confirmed by the statistics. Newspapers with circulations of 100,000-250,000 now sell 31% of their papers through single-copy purchases; for papers with circulations of 500,000 and above, single copy purchases account for 56% of sales.³⁰ Single-copy purchasing is most important in central cities (particularly in the Northeast) that have busy mass transit and active downtowns. It is, however, becoming increasingly important everywhere, even to the smallest newspapers.³¹

C. Satisfactory Substitutes for Newsracks Do Not Exist.

The growing importance of single-copy distribution requires the presence of sales outlets in sufficient numbers to meet readers' needs. Newsracks best fill those needs. No other outlet provides the same convenience, the same efficiency, or the same ability to put the newspaper where people need it.

Lakewood contends that there exist numerous substitutes for distributing newspapers through newsracks. For a variety of reasons, however, alternative methods cannot effectively replace newsracks for a significant segment of the reading public and a significant number of newspapers. The factual assumptions underlying Lakewood's argument ignore the changing conditions that have made

³⁰ A.N.P.A. report, *supra*, note 27, at 1.

³¹ For example, the Booneville, Arkansas *Democrat*, owned by *amicus* Donrey Media Group, sells 38% of its average 3100 daily circulation through single-copy sales.

newsracks so critical to newspaper distribution. Lakewood also disregards other newspapers, such as *amici*, who wish to distribute from newsracks on the streets of Lakewood and other similar cities, where they have no home subscription base and where retail dealers may not wish to stock copies of an out-of-town newspaper. *The Plain Dealer's* high rate of home subscriptions should thus be given little weight; it is neither applicable to other newspapers in Lakewood nor to other localities. The impact of a newsrack ban is clear. A decision that allows cities to close their streets and sidewalks to newsracks will diminish many newspapers' ability to contact readers and will drastically limit readers' varied and easy access to the information they seek.

Moreover, appellant's alternative access argument is fatally flawed because it wrongly assumes that the existence of alternative channels alone justifies a newsrack ban. An otherwise valid restriction becomes invalid if other means of communication are inadequate. See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). The converse, however, is not true. The availability of some other avenues of expression does not save an otherwise unconstitutional restriction:

the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. New Jersey, 308 U.S. 147, 163 (1939). See also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981). By long tradition, public streets and sidewalks have been appropriate places for the distribution of newspapers. Lakewood's alternative forum argument proves too much. Without ever addressing the appropriateness of the public streets and sidewalks for the placement of newsracks, it asks this Court to ban newsracks because some other place may also be appropriate. Rarely, however, is some alternative means of distribution totally unavailable. Determinative weight should not be given to this factor. It masks the real issue — are Lakewood's governmental interests sufficient to support the drastic imposition of a total ban. See pages 20-22, *infra*.

The fact that the alternatives constitute, in large part, private vendors or landowners further negates Lakewood's alternative forum argument. The availability

of private news outlets should be, from a constitutional standpoint, irrelevant. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-57 (1975). See *Providence Journal Co. v. City of Newport*, No. 86-0320 (D.R.I. June 12, 1987); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228, 242 n.8 (E.D. Pa. 1974). As private parties, retail outlets (or individual property owners) have the ability to, and do, discriminate on the basis of content. The out-of-town newspaper or the minority-outlook paper is especially vulnerable on these grounds. Banning newsracks because some hypothetical private outlets exist, therefore, can lead directly to impermissible content regulation. Also, because they primarily sell other products, retail outlets can decide not to carry a particular publication because of lack of shelf space or because only an unprofitable number of sales can be made. For example, some of the nation's largest retail distributors of newspapers are small quickstop grocery outlets, but floor space is so limited that many will not carry a *selection* of newspapers because newspapers do not economically justify the space they take from more profitable products. First Amendment freedoms should not be placed at the mercy of such market decisions.

Even these private-sector alternatives are inadequate. Changing readership habits have made home subscriptions an ineffective means of reaching many readers. Newspapers are one of the last personally home-delivered products in the country. The continuing availability of home subscription may be threatened because of the same socioeconomic trends that saw the virtual disappearance of the milkman and the Avon lady. For many newspapers, home subscription is not even a viable alternative. In the case of a national newspaper, such as *USA TODAY*, readers are so scattered that traditional home delivery becomes impracticable in many areas.¹² Similarly, for start-up newspapers, single-copy newsracks sales may be the only means of establishing the readership base necessary before converting to home subscriptions.

¹² Only mail delivery is possible, which may not be satisfactory to most newspaper readers because of the delay involved.

Newsstands or other retail outlets are also an inadequate alternative. The once ubiquitous clapboard newsstand has now disappeared from most city streets. Statistics show that the number of newsstands is dramatically declining.¹⁷ In New York City alone, the number of newsstands has declined from 1325 in 1950 to 311 in 1983. Retail outlets are also inadequate because they are inconvenient — many readers will not or cannot go 1/4 mile out of their way to purchase a newspaper. This is particularly true for the elderly or for those without private transportation. In addition, retail outlets are not always open for early morning commuters and those working non-daylight shifts.

Private-sector outlets, therefore, cannot provide the same quality of expression as newsrack distribution on public streets, i.e., the alternative options posited by Lakewood involve more cost and less autonomy, are less likely to reach persons not deliberately seeking the message, and are a less effective medium for communicating. See *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 93 (1977). Consequently, the alternatives to newsrack distribution “are far from satisfactory.” *Id.*

D. The Asserted Governmental Interests Cannot Support a Complete Newsrack Ban.

The present case involves one more instance where the Court is called upon to perform the balancing test required when an exercise of the police power clashes with a mode of communication protected by the First Amendment. The test requires a “particularized inquiry into the nature of the conflicting interests at stake.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503 (1981). As amici have set out above, the First Amendment interests are compelling. Lakewood argues that the governmental issues are no less so. It fails to establish, however, that those interests require the complete newsrack ban that it would so readily impose.

Because a public forum is involved, Lakewood’s desired ban on newsracks may be upheld only if it is “narrowly drawn to serve a compelling governmental interest.” *United States v. Grace*, 461 U.S. 171, 177 (1983). Moreover, in deter-

¹⁷ *Presstime*, *supra* note 29, at 7.

mining whether the proposed ban meets constitutional standards, “[t]he nature of a place, ‘the pattern of its normal activities, dictate the kinds of regulation of time, place and manner that are reasonable.’ ” *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (citations omitted).

Lakewood essentially argues that two governmental interests support its proposed newsrack ban — public safety and aesthetics.¹⁸ The first of those interests — public safety — cannot justify Lakewood’s total ban. The Record fails to support any conclusion that newsracks present any safety problems, either to pedestrians or vehicles. Rather, it contains conclusory generalities that newsracks, like utility poles, mailboxes, or fire hydrants, can be hit by cars or falling pedestrians. But Lakewood offers no evidence of any accidents involving a newsrack. Nor has there been a showing that steps short of a complete ban would be inadequate to alleviate the hypothetical safety problems posed by newsracks. Amici have cooperated with municipalities across the United States to resolve local concerns about newsrack placements and their impact on safety. These concerns are routinely satisfied. In these circumstances, the proposed ban falls far short of satisfying constitutional scrutiny. See *Southern Connecticut Newspapers, Inc. v. Town of Greenwich*, 11 Med. L. Rep. (BNA) 1051, 1055 (D. Conn. 1984).

Lakewood’s aesthetic rationale is no more compelling. According to Lakewood, newsracks are a substantive evil, a “visual blight.” Appellant’s Brief at 36. The factual bases for this conclusion are (1) the side-by-side placement of newsracks without regard to uniform color or design; (2) random placement; and (3) the collection of litter. Appellant’s Brief at 8. Absent from any of Lakewood’s arguments is a justification why steps short of a total ban would not resolve these perceived problems.

Equally important, Lakewood’s reliance on generalized aesthetic judgments, divorced from context, bespeaks more a rationalization than a compelling reason. Aesthetics are primarily a function of context. Aesthetic regulation may be compelling in some circumstances and lack the substance to overcome First

¹⁸ Lakewood also argues that granting First Amendment protection for newsracks constitutes a “permanent taking” of its property. See pages 23-25, *infra* for a refutation of this argument.

Amendment rights in another. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("[T]he question whether a particular thing is a nuisance, is to be determined not by abstract consideration . . . but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of a barnyard").

Newsracks are appropriate to the streets. On Lakewood's streets and sidewalks, they share space with billboards, lampposts, trash cans, bus shelters, fire hydrants, phone booths, electric boxes, street signs, utility poles, and traffic control devices. See JA 256-64; 285-93. As noted by a district court in similar circumstances, newsracks hardly detract from the typical urban landscape:

[T]he photographs show that many of the rights of way in question are located in populated, commercial areas where the boxes may even seem at home and not in unspoiled scenic countrysides where the boxes might truly look out of place.

Southern New Jersey Newspapers, Inc. v. New Jersey Department of Transportation, 542 F. Supp. 173, 187 (D.N.J. 1982). See also *Providence Journal Company v. City of Newport*, slip op. at 15-16.

Context thus belies Lakewood's belated aesthetic justifications for a total ban. The history and purpose of First Amendment exercise in public fora further minimize their force. The public streets and sidewalks are the traditional place for a cacophony of noise and a kaleidoscope of visual images. As freedom of speech brings with it some "verbal tumult, discord and even offensive utterance" as "necessary side effects of the broader enduring values that the process of open debate permits us to achieve" (*Cohen v. California*, 403 U.S. 15, 24-25 (1971)), so too must there be some tolerance for less than pristine aesthetics as a price of free and open newspaper distribution on public streets and sidewalks. This does not denigrate, or even present for review, the governmental interest in aesthetics. History and the purpose of First Amendment demonstrate, however, that a total ban on newsracks cannot pass constitutional muster. Rather, "any abuses that [newsracks] create can be controlled by narrowly-drawn statutes." *Saia v. New York*, 334 U.S. 558, 562 (1948).

E. Newsracks Do Not Permanently "Take" Public Property.

As one of its featured arguments, Lakewood also contends that the decision below is an unconstitutional "taking" of the municipality's property rights, as if the Sixth Circuit exercised the power of eminent domain. Appellant's Brief at 19. Attempting to invoke some talismanic concept of property rights, Lakewood argues that all other First Amendment authority pertaining to access to public streets and sidewalks is somehow inapplicable because it related only to a "peripatetic" versus a "permanent" occupation of public property. *Id.* at 22.

Lakewood's argument misses the mark both factually and legally. Newsracks do not permanently occupy public property in the manner that Lakewood argues. Equally important, the duration of First Amendment access does not determine whether any right exists. Rather, this Court's decisions have required the inquiry to focus on whether the proposed communicative use (here newsracks) interferes with either the intended purpose of the public property or the public's ability to use and enjoy that property. This functional inquiry will demonstrate that newsracks need pose no more interference with the purposes of streets and sidewalks than peripatetic soliciting or distributing literature.

In their practical impact on municipality's property interests, newsracks are little different than human news vendors:

They are easily moved and in a way are functionally safer than a newsboy. They cannot change positions by themselves, and they cannot run against one. They are essentially semi-stationary newsboys.

* * *

[They] are not permanent nor are they absolutely stationary. Their location can be changed simply by turning a key in a lock.

Gannett Co. v. City of Rochester, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (N.Y. Sup. Ct. 1972).¹⁵ Far from being permanent, amici's newsracks are regularly being

¹⁵ In many ways, newsracks are less intrusive than street hawkers. Newsracks are silent, they do not bump into people, and they do not move in and out of busy streets, as hawkers often do. They present far less of a policing problem than mobile hawkers. See, e.g., *Presstime*, *supra* note 28.

moved, both voluntarily and upon request of local authorities. For example, *amici* remove their newsracks from along Washington's Pennsylvania Avenue for inaugural and other parades. *Amici* also move their newsracks for construction, because municipalities want to use the space for other purposes, or for special events. As part of an "Agreement of Principles" with the City of New York, for example, four of the *amici* agreed as follows:

Should the City require the space occupied by a machine or should a repair be required at the location of a machine, said machine will be removed within three days of notification by the City. In an emergency repair situation, the machine will be removed forthwith upon notification.

All that is required is a request, a pickup truck, and the newspaper's employee to lift the newsrack off the street. Fully portable newsracks occupy approximately three square feet of public property. They can hardly be said to dispossess permanently any municipality of its right to use that small portion of the public right of way. A retaking is available for the asking.

These facts refute Lakewood's permanent taking argument, and the Court's precedents deny it any legal basis. In *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946), this Court rejected an argument based upon a mechanical application of property rights:

Whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

* * *

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position.

The *Marsh* principle shows that Lakewood's argument lacks legal merit. This is not a case where a Fifth Amendment principle is at stake — Lakewood seeks no compensation:

[The] basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of an otherwise improper interference amounting to a taking.

First English Evangelical Lutheran Church v. County of Los Angeles, 55 U.S.L.W. 4781, 4784 (June 9, 1987). Rather, Lakewood seeks to twist the "taking" rationale in order to escape from the First Amendment balancing test required by *Marsh* and its progeny. But government routinely creates burdens for some that directly benefit the common good. See *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 223 (1986). In order to exalt its claimed property interests over its citizens' interests in the news, Lakewood must show that the property interests that support a total ban are both compelling and irreconcilable with the placement of newsracks alongside its streets and sidewalks. This it cannot do.

In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), for example, the Court rejected an argument similar to Lakewood's based upon the "taking" of property. There, the Court examined the character of the communicative activity and its economic impact on the property involved, a private shopping mall. It specifically rejected the notion that the private owners' "right to exclude others" was so essential to the use or economic value of its property that compelled access amounted to a "taking" in the constitutional sense. See 447 U.S. at 84.

Surely *Pruneyard's* reasoning applies even more strongly when the property in question is a traditional public forum. Lakewood has failed to demonstrate that the placement of newsracks alongside public streets and sidewalks either destroys the economic value of that property to the city or is in any manner inconsistent with its public use. Indeed, the distribution of newspapers through newsracks on the public sidewalks is no less a public use than is the daily movement of the same newspaper's delivery trucks on the public streets.³⁰

³⁰ *Pruneyard* also notes the availability of reasonable time, place and manner restrictions that can serve to minimize any interference with the property's function. See 447 U.S. at 83-84.

POINT II

LAKEWOOD'S ORDINANCE IS NOT A REASONABLE
TIME, PLACE AND MANNER REGULATION.

Along with arguing that it should be able to ban newsracks entirely, Lakewood attempts to uphold its existing newsrack ordinance, Lakewood Codified Ordinances Section 901.181 (JA 280), which was enacted after *The Plain Dealer* initiated its challenge to an earlier ordinance that prohibited erecting structures on "public ground." The Sixth Circuit struck down the revised ordinance, holding it constitutionally infirm because it allowed municipal authorities unbridled discretion to grant or deny a permit under the ordinance's licensing system. See 794 F.2d at 1143-46. *Amici* contend that the Sixth Circuit's conclusion states the correct constitutional principles.

Two major defects characterize the revised ordinance. First, it permits Lakewood's Mayor to grant or deny a newsrack permit on terms and conditions "deemed necessary or reasonable by the Mayor." (JA 283). Second, it allows an Architectural Review Board, with no guidelines for the exercise of its discretion, to approve or disapprove any newsrack design. (JA 280).¹⁷ No review procedure is provided by the ordinance except an unspecified right of appeal to the Lakewood City Council, which has no deadline for considering or acting on the appeal. Any newspaper's challenge to the municipality's decisions under the ordinance must be brought in the courts of Ohio under a general administrative procedure act.

Similar defects in a licensing procedure have been held to create an unconstitutional prior restraint:

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or with-

¹⁷ Although it was not litigated below, the ordinance also engages in impermissible content-discrimination. It permits newsrack placement only to those newspapers "having general circulation throughout the city." (JA 280). Many *amici*, and many other special interest newspapers, may not qualify for permits under this provision.

held in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958). Accord, *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 55 U.S.L.W. 4855, 4857 (U.S. June 15, 1987); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

Lakewood's ordinance cannot be saved from this defect by the review procedure afforded. It fails to provide meaningful review in a timely manner. As in *Freedman v. Maryland*, 380 U.S. 51 (1965), Lakewood's procedures for appealing from a license denial suffer from the vice of offering judicial review that may be too little and too late. In effect, it allows municipal authorities to ban newsrack distribution and force the newspaper into protracted and expensive proceedings either to overturn the ban or determine an appropriate placement or design that will satisfy the authorities. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) ("If a scheme that restricts access to the mails must furnish the procedural safeguards in *Freedman*, no less must be expected of a system that regulates use of a public forum").

Standardless discretion, coupled with lack of meaningful review, is particularly dangerous in a regulatory scheme that rests either on the mayor's subjective determination of what is "necessary and reasonable" or an architectural review board's determination of an appropriate aesthetic design. The power of censorship inheres in this type of ordinance. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981). Officials can either mask content-based antipathy with an aesthetic rationalization, or they can rely on personal aesthetic judgments that are neither shared by the community nor possible of reasonable attainment. In either situation, a reviewing court has no objective basis for determining whether First Amendment rights have been inappropriately denied.

Amici's experience with municipal ordinances across the United States underscores the problems prevalent with newsrack ordinances that are so standardless that they give neither the municipal officer nor a reviewing court any guidance. *Amici* have faced a number of situations where local newsrack ordinances have been proposed or enacted shortly after publication of articles or editorials critical

of local government officials. A reviewing court would never be able to test the *bona fides* of a local official's motivation in such a situation unless standards are clearly set out.

Many of the *amici* have also been confronted by officials who, without legislative mandate, have frustrated the attempts to place newsracks within their municipal borders. The experience of *amicus* Gannett, when it started up a new national newspaper, is especially illustrative.

Gannett began publishing *USA TODAY* in 1982. As a new newspaper attempting to reach the entire country, Gannett took *USA TODAY* into fifteen major metropolitan areas over the first eight months, market by market, sometimes starting up new markets once a week. At first, economics and practical considerations made it impossible to offer home delivery or mail subscriptions. So the newspaper depended on sales through newsracks and through privately-owned retail sales outlets. Retail dealers, of course, could refuse to carry *USA TODAY* if they wished, and many did until it could be proved that reader demand existed. Similarly, advertisers would not buy space in *USA TODAY* until it could be proved that people were reading it. Thus, newsracks were critical to the introduction of *USA TODAY*, and it was imperative that newsracks be available to readers in the new markets.

Occasionally the task of placing newsracks became unreasonably difficult and unconscionably expensive. Some municipal officials, despite the long-time placement of newsracks by local newspapers, reacted negatively to the new publication's efforts. Acting without ordinances or with ordinances vaguely related to obstructions of public ways, they banned newsracks, enacted onerous conditions, or delayed responding to requests for permits so that they succeeded in frustrating the distribution of *USA TODAY* in their communities. In places like these, only extensive involvement by lawyers in negotiation or litigation enabled *USA TODAY* to begin distribution. For example:

- In one large city, the so-called "Minor Privilege Permit," apparently intended to apply to small construction jobs, was used to require *USA TODAY* to hire a process server to deliver notice of the arrival of newsracks to every property owner adjacent to a proposed newsrack site.

- More than once, the local authorities in several towns in one region would decide at the same time to ban newsracks from their streets when they received *USA TODAY*'s introductory letter asking to see their regulations affecting the placement of newsracks. The very act of attempting to comply with local ordinances produced a reaction designed to frustrate newspaper distribution. See, e.g., *Gannett Satellite Information Network, Inc. v. Town of Norwood*, 579 F. Supp. 108 (D. Mass. 1984).
- In a small Florida resort town, just before the newspaper's introduction to South Florida, the newspaper wrote to the Town Manager and asked for cooperation in the placement of the *USA TODAY* newsracks. Days later, when the newsracks were placed in town, police officials, acting without notice to the newspaper and without the justification of an emergency, confiscated over half of *USA TODAY*'s newsracks. The "decision" had been made that *USA TODAY* needed no more newsracks than the metropolitan daily that already circulated in the town.

USA TODAY's experience, confirmed by *amici*'s similar experiences nationwide, points out that municipalities who would regulate newsracks should do so only under well-defined regulations, with full procedural safeguards. Otherwise, the experiences of *The Plain Dealer* and *amici* in the present case will be endlessly repeated. Even within one metropolitan area, dozens of separate governmental units exist that could frustrate the start up of a new newspaper or the efforts of an existing newspaper to reach new readers. Although *amici* hardly expect that all municipalities will have uniform newsrack regulations, they do expect that the requirements be consistent with the Constitution, and be based upon the considered judgment of local legislators rather than the whim of a single officer. The First Amendment is not well served when standardless discretion can disguise reaction to content, when censorship hides behind bureaucratic inertia, and when the only newspapers that can distribute through newsracks are those able to afford an array of lawyers.²⁸

²⁸ *Amici* also urge that this Court affirm the Sixth Circuit's decision striking down the indemnification requirements of section 901.181(c)(5) of the Lakewood ordinance (JA 282-3). See 794 F.2d at 1146-47. *Amici* adopt the arguments of appellee Plain Dealer Publishing Company respecting the unconstitutionality of these provisions.

CONCLUSION

For the foregoing reasons, in addition to those presented by appellee Plain Dealer Publishing Company, *amici* respectfully urge that the Sixth Circuit's decision below be affirmed.

Dated: July 17, 1987

NIXON, HARGRAVE, DEVANS & DOYLE

Robb M. Jones (Counsel of Record)

Robert C. Bernius

One Thomas Circle, N.W.

Suite 800

Washington, D.C. 20005

Telephone: (202) 223-7200

Counsel listed on inside front cover

Attorneys for *Amici Curiae*

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAKEWOOD,

Appellant,

—v.—

PLAIN DEALER PUBLISHING CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF
APPELLEE, PLAIN DEALER PUBLISHING CO.**

Of Counsel:

John A. Powell
Steven R. Shapiro
David B. Goldstein
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Bruce A. Campbell
American Civil Liberties
Union of Ohio Foundation
360 South Third Street
Suite 150
Columbus, Ohio 43215
(614) 228-8951

Paul L. Hoffman
American Civil Liberties Union
Foundation of Southern California
633 So. Shatto Place
Los Angeles, California 90005
(213) 487-1720

STEPHEN W. GARD
GORDON J. BEGGS
Counsel of Record
American Civil Liberties Union
of Cleveland Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6276
Attorneys for Amicus Curiae

QUESTIONS PRESENTED

- I. WHETHER THE DISTRIBUTION OF NEWSPAPERS ON THE PUBLIC STREETS AND SIDEWALKS THROUGH NEWSRACKS IMPLICATES THE FIRST AMENDMENT RIGHTS OF THE PRESS TO DISSEMINATE AND THE PEOPLE TO RECEIVE INFORMATION ESSENTIAL TO A FUNCTIONING DEMOCRACY AND IS ENTITLED TO FULL CONSTITUTIONAL PROTECTION
- II. WHETHER THE CITY OF LAKEWOOD ORDINANCE VESTS UNBRIDLED DISCRETION IN THE MAYOR AND CITY COUNCIL TO GRANT OR DENY A PERMIT AND THUS AUTHORIZES A CONTENT-BASED PRIOR RESTRAINT CONDEMNED BY THE FIRST AMENDMENT
- III. WHETHER THE STREETS AND SIDEWALKS CONSTITUTE A QUINTESSENTIAL PUBLIC FORUM AND WHETHER THIS ORDINANCE IS A REASONABLE TIME, PLACE AND MANNER REGULATION.

IV. WHETHER THE INDEMNIFICATION AND
INSURANCE REQUIREMENTS CONTAINED IN
THE LAKEWOOD ORDINANCE ARE
UNCONSTITUTIONAL ON THEIR FACE AND
AS APPLIED IN THIS CASE

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union, is a nationwide, non-partisan not-for-profit organization of more than 250,000 members dedicated to the preservation of the civil rights and liberties guaranteed to all Americans by the Bill of Rights.

Since its founding in 1920, the American Civil Liberties Union, in furtherance of its historic mission, has appeared frequently in this Court and in other courts, as counsel for a party and as amicus curiae, in cases challenging governmental actions which infringe upon the fundamental freedoms of speech and press. In this endeavor the American Civil Liberties Union has been especially vigilant in the representation of the first amendment rights of citizens to receive information and

ideas when that right has been threatened by governmental action that limits access to the knowledge essential to a functioning democracy.

In this case we urge this Court to reaffirm its unbroken chain of precedents denying government the power to impose content-based prior restraints on the free press by means of regulations which grant unbridled discretion to municipal officials. We also urge this Court to reaffirm its numerous prior holdings that the public streets and sidewalks constitute a quintessential public forum which must be held open to all citizens for the purpose of disseminating and receiving information. Finally, we urge this Court to hold that unduly burdensome insurance requirements may not be imposed on persons who wish to use the

public streets and sidewalks as a public forum for activities protected by the first amendment.*

*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

STATEMENT OF THE CASE

The full factual background of this case and the opinion of the court below are reported in Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986). The essential facts can be stated briefly.

The Plain Dealer is, and has been since the demise of the Cleveland Press in 1982, the only daily newspaper of general circulation in the greater metropolitan area of Cleveland, Ohio. The City of Lakewood is a municipality of approximately 62,000 people which abuts the City of Cleveland.

In May 1982 the City of Lakewood denied permission to the Plain Dealer to place coin-operated newsracks at sites within the City of Lakewood on the authority of Section 901.18 of the Lakewood Codified Ordinances, which at

that time flatly banned all such newsracks on all public property located within the City of Lakewood.

The Plain Dealer filed suit challenging the facial constitutionality of this flat ban and, on August 18, 1983, the United States District Court for the Northern District of Ohio ruled the flat ban violative of the first amendment to the United States Constitution, but held the issuance of a permanent injunction in abeyance for sixty (60) days to give the City the choice of standing on the flat ban or enacting an amended ordinance.

On January 3, 1987 the City of Lakewood chose to abandon its total prohibition of all newsracks and enacted Section 901.181 of the Lakewood Codified Ordinances, which was thereafter upheld by the district court. Despite the fact

that the city officials who testified at trial had never been consulted about the ordinance prior to its passage (JA 111, - 126, 137, 147), the district court found the enactment of the ordinance justified by esthetic and safety concerns. In addition, the district court found that the existence of private property owners in Lakewood willing or potentially willing to sell the Plain Dealer constituted adequate alternative sites for dissemination of newspapers in the City of Lakewood.

The United States Court of Appeals for the Sixth Circuit held Section 901.181 of the Lakewood Codified Ordinance facially unconstitutional in three specific aspects.

First, it held that the following provisions of Section 901.181 vested unbridled discretion to grant or deny a

permit for a newsrack in the mayor:

The Mayor may either deny the application, stating the reasons for such denial or grant said permit subject to the following terms:

- (c) The rental permit shall be granted upon the following conditions:
 - (7) such other terms and conditions deemed necessary and reasonable by the Mayor.

Second, the Court of Appeals found similarly flawed the provision granting standardless power to the Architectural Board of Review, a municipal body which has no guidelines relevant to newsracks (JA 111, 114) and a majority of whom have no architectural training or education (JA 108):

- (a) The design of such devices shall be subject to approval

by the Architectural Board of Review.

Finally, the Court of Appeals held unconstitutional on its face Section 901.181(c)(5) which requires the newspaper to obtain at its own expense liability insurance in an amount not less than one hundred thousand dollars as a pre-condition to access to the public sidewalks of the City of Lakewood.

SUMMARY OF THE ARGUMENT

The first amendment was intended to secure the widest possible distribution of information in order to attain an informed citizenry. For this reason this Court has consistently held that the distribution of news is entitled to full constitutional protection. Newspapers are not deprived of this protection merely because they are sold at a profit. This protection extends to the distribution of newspapers by means of newsracks, a mode of communication which has been traditionally utilized in this country for over 40 years, which is merely a safer and economically feasible alternative to "news hawkers", and which is essential to the existence of many newspapers.

The Lakewood ordinance vests unbridled discretion in the Mayor, City

Council and Architectural Board of Review to deny a permit to place newsracks on the public streets and sidewalks. It authorizes an unconstitutional content-based prior restraint upon first amendment freedoms.

First amendment activities, including the dissemination of information and ideas through newsracks, cannot be prohibited on public streets and sidewalks which have been recognized, since time out of mind, as appropriate places for constitutionally protected communication. It is fifty years too late for a municipality to defeat such rights by a naked assertion of title to public property. Instead, this Court historically has recognized the existence of a "First Amendment easement" on public streets and sidewalks.

The Lakewood ordinance is not narrowly tailored to achieve significant governmental interests. The record does not support the claim that public safety or concern for esthetics actually motivated the enactment of the ordinance; instead, they have been asserted as after-the-fact rationalizations. The safety hazards of newsracks, if any, are less than those presented by human news vendors and can be remedied by enforcement of generally applicable criminal laws. Similarly, the asserted municipal concern for esthetics can be accommodated by a more narrowly tailored ordinance. In brief, the City of Lakewood cannot meet the heavy burden of proof imposed on it by the first amendment.

The only alternative means available to distribute newspapers on a

single-copy basis are located on private property and thus are not adequate for first amendment purposes. Moreover, the ordinance relegates newsracks to commercial establishments where persons desiring to buy a newspaper must actively search for them. The first amendment, in contrast, requires that the news media have an opportunity to win the attention of potential recipients.

The "hold harmless" and insurance provisions of the Lakewood ordinance are unconstitutional because they selectively impose a financial burden on first amendment activities not placed on other similar activities. The "hold harmless" provision impermissibly imposes strict liability and requires the press to assume financial liability for the torts of unrelated third

persons. There is no rational basis for requiring public liability insurance for an activity that poses no risk of harm. Preconditioning access to the public forum on the purchase of insurance unconstitutionally discriminates against new and unpopular organizations. Access to the streets and parks, the "poor man's printing press", cannot be made to depend on one's financial status.

ARGUMENT

I. THE DISTRIBUTION OF NEWSPAPERS ON THE PUBLIC STREETS AND SIDEWALKS THROUGH NEWSRACKS IMPLICATES THE FIRST AMENDMENT RIGHTS OF THE PRESS TO DISSEMINATE AND THE PEOPLE TO RECEIVE INFORMATION ESSENTIAL TO A FUNCTIONING DEMOCRACY AND IS ENTITLED TO FULL CONSTITUTIONAL PROTECTION

In this case amicus simply urges this Court to reaffirm its historic commitment to the basic principle that the first amendment was intended "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), quoting Associated Press v. United States, 326 U.S. 1, 20 (1945).

As early as 1877 this Court recognized that: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex Parte Jackson, 96 U.S. 727, 733 (1877). See also Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 647 (1981); Talley v. California, 362 U.S. 60, 64 (1960); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

Liberty of circulation is essential not only to the freedom to disseminate ideas, it is equally essential to the constitutional right of the "public to receive suitable access to social, political, esthetic, moral, and other ideas ...that...may not constitutionally be abridged." Red Lion Broadcasting Co. v. Federal Communications Commission,

395 U.S. 367, 390 (1969). See also Martin v. City of Struthers, 319 U.S. 141, 143 (1943). These rights of third persons, including other news disseminators and the recipients of such information, can be asserted by the appellee here because the ordinance has been challenged on its face. See, e.g., Board of Airport Commissioners v. Jews for Jesus, Inc., 55 USLW 4855, 4856 (1987); Secretary of State v. J.H. Munson Co., 467 U.S. 947, 956-59 (1984); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

The full constitutional protection for distribution and receipt of news and information is not lost simply because newspapers are sold for a profit, otherwise "the passing of the collection plate in church would make the church service a commercial project." Murdock

v. Pennsylvania, 319 U.S. 105, 111 (1943). Thus, it has been repeatedly held that the fact that the distributor of the information has an economic motive does not convert the materials into "commercial speech." See, e.g., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 (1983) (pamphlets); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (newspapers); Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (motion pictures).¹ As this Court recognized in Murdock v. Pennsylvania, 319 U.S. at 111: "It should be remembered that the

¹ Similarly, the fact that some newsracks have placards containing advertising is irrelevant. It is the newsracks, not the placards, that the City of Lakewood wishes to regulate.

pamphlets of Thomas Paine were not distributed free of charge."

Every court which has addressed the issue has concluded that the full first amendment protection afforded to news dissemination extends to the distribution of newspapers by means of newsracks located on public property. See, e.g., Plain Dealer Publishing Co., v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986); Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2nd Cir. 1984); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984).

Coin-operated newsracks are not a new technological innovation in the distribution of newspapers. They have been utilized pervasively in this country since the early 1940's. See,

e.g., Philadelphia Newspapers, Inc. v. Borough of Swarthmore, 381 F. Supp. 228, 237 (E.D. Pa. 1974); Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648, 654 (Sup. Ct. 1972). "Honor" newsracks, without the coin-operation, were used extensively in the United States prior to 1940 and represent nothing more than a silent, safer and economically feasible alternative to the "news hawker", found on the streets and sidewalks of this country as early as 1810. See generally A. Lee, The Daily Newspaper in America 258-70 (1937).

Newsracks are not only a time-honored means of newspaper distribution, they represent a safer alternative to the "news hawker". The inanimate newsrack is incapable of being either the perpetrator or victim of crime or auto accidents, unlike the human vendor of

newspapers. See New York Times, March 22, 1987, § 3 at 21 (reporting murder, sexual assault and disappearance of news vendors while on the job; one-third of those interviewed reported dangerous situations).

Any attempt to distinguish Lovell v. City of Griffin, 303 U.S. 444 (1938), on the ground that Alma Lovell was a peripatetic seller of pamphlets is unconvincing on three grounds. First, a newrack is a safer, "less drastic alternative" to Alma Lovell. Second, in Lovell the City of Griffin argued that first amendment protection should be denied because pamphlets, not newspapers, were being distributed and the Court voided the ordinance specifically noting its potential application to newspaper vendors. See id. at 445, 450. Finally, newsracks

simply are "not permanent nor... absolutely stationary. Their location can be changed simply by turning a key in a lock." Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

Newsracks are "crucial to the survival" of many publications. Remer v. City of El Cajon, 52 Cal. App. 3d 441, 443, 125 Cal. Rptr. 116, 117 (1975). While it is true that most readers of the Plain Dealer subscribe to home delivery, nevertheless more than 21,000 people buy the paper daily from coin-operated newsracks. The relatively small proportion of newsrack sales of the Plain Dealer is certainly attributable to the fact that it is the newspaper in a one newspaper town. Other publications without that advantage rely on newsrack sales for

their very existence. See, e.g., The Washingtonian, August 1984, at 77. (Two-thirds of USA Today's daily sales are from newsracks and newsstands). Thus, it is no exaggeration that the effect of an ordinance such as that at issue here could be to condemn a city to the perpetual status of a one newspaper town.

II. THE CITY OF LAKEWOOD
ORDINANCE VESTS UNBRIDLED
DISCRETION IN THE MAYOR AND
CITY COUNCIL TO GRANT OR DENY
A PERMIT AND THUS AUTHORIZES A
CONTENT-BASED PRIOR RESTRAINT
CONDEMNED BY THE FIRST
AMENDMENT

A. The First Amendment Condemns
Ordinances That Vest Unbridled
Licensing Discretion In
Municipal Officials

Thirty years ago, in Staub v. City of Baxley, 355 U.S. 313, 322 (1957), this Court held:

It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official - as by requiring a permit or license which may be granted or withheld in the discretion of such official - is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

See also Largent v. Texas, 318 U.S. 418, 422 (1943) ("This is administrative censorship in an extreme form."); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940); Schneider v. State, 308 U.S. 147, 164 (1939).

Such ordinances may, therefore, be challenged on their face without the necessity for first applying for a permit. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151

(1969); Staub v. City of Baxley, 355 U.S. 313 (1968); Lovell v. City of Griffin, 303 U.S. 444, 452-53 (1938).

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

B. The City of Lakewood Ordinance
Unconstitutionally Vests
Unbridled Licensing Discretion
In Municipal Officials.

In this case the municipal officials of the City of Lakewood "stan[d] athwart the channels of communication as an obstruction....A more effective previous restraint is difficult to imagine." Saia v. New York, 334 U.S. 558, 561 (1948). Under Section 901.181 of the Lakewood Codified

Ordinances there are absolutely no standards to limit or constrain the Mayor's decision. Instead, this section simply provides: "The Mayor shall either deny the application, stating the reasons for such denial or grant said permit...." In such a situation where the ordinance grants unbridled discretion we can be confident that accurate, after-the-fact judicial review will be difficult, if not impossible, since "the abuse of administrative discretion is likely to find shelter behind a record of contradictory testimony and retrospective rationalization." L. Tribe, American Constitutional Law 733 (1978).

In the event that the Mayor of the City of Lakewood exercises this discretion favorably, a newspaper must still run the gauntlet of Section

901.181(c)(7) of the Lakewood Codified Ordinances, which provides:

(c) The rental permit shall be granted upon the following conditions:

(7) such other terms and conditions deemed necessary and reasonable by the Mayor.
.....

This provision, like many other governmental regulations struck down by this Court, also provides no meaningful standards to guide the Mayor in the exercise of his discretion. See, e.g., Secretary of State v. J.H. Munson Co., 467 U.S. 947, 964 n. 12 (1984); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). Indeed, as this Court held in Lovell v. City of Griffin, 303 U.S. 444, 452 (1938): "Legislation of the type of the ordinance in question

would restore the system of license and censorship in its baldest form."

Another wholly objectionable provision of the Lakewood Codified Ordinances is Section 901.181(a), which provides in pertinent part:

The design of such devices shall be subject to approval by the Architectural Board of Review

At trial Robert Finney, Chairman of the Architectural Board of Review, admitted that a majority of this body has no architectural training and that there exist absolutely no standards for the Board to apply in making its decision whether to approve a newsrack (JA 108, 111, 114). If it is true, as this Court has recognized, that "[a]nnoyance at ideas can be cloaked in annoyance at sound," Saia v. New York,

334 U.S. 558, 562 (1948), then it is equally true that distaste for an idea can be cloaked in distaste for architectural design. Simply stated, "[t]he power of censorship inherent in this type of ordinance reveals its vice." Id.

C. The City of Lakewood Ordinance Fails to Provide The Procedural Safeguards Required By The First Amendment

The fact that Section 901.181(e) provides for a right to appeal to the City Council does not save this ordinance for, indeed, the ordinance contains no standards for the City Council to apply in ruling on the appeal. See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Staub v. City of

Baxley, 355 U.S. 313 (1958). Similarly, the possibility of judicial review of the decision of the Mayor and City Council cannot save this ordinance from constitutional condemnation for the fundamental reason that there are present none of the procedural safeguards mandated by Freedman v. Maryland, 380 U.S. 51 (1965). The burden of proof in such appeal is not placed explicitly on the City of Lakewood. Id. at 58, citing Speiser v. Randall, 357 U.S. 513, 526 (1958). Indeed, under the ordinance the burden of initiating the judicial appeal is impermissibly placed on the newspaper, not on the censor, as the first amendment requires. See Freedman, supra, at 58-59. Finally, there is no provision for a "prompt judicial decision." Id. at 59. See also National Socialist

Party v. Skokie, 432 U.S. 43, 44 (1977)
(per curiam) (requiring "immediate
appellate review").

D. The City of Lakewood Ordinance
Is Impermissibly Content-Based

Where an ordinance, as here, vests
unbridled discretion to impose a prior
restraint on first amendment activities
with no procedural safeguards, this
Court has recognized the potential for
both content-based discrimination and
"suppress[ion of] a particular point of
view." Heffron v. International Society
for Krishna Consciousness, 452 U.S. 640,
649 (1981). See also Southeastern
Promotions, Ltd. v. Conrad, 420 U.S.
546, 553 (1975); Niemotko v. Maryland,
340 U.S. 268, 282 (1951) (Frankfurter,
J., concurring).

Indeed, this ordinance does
discriminate explicitly on the basis of
content. For example, the ordinance
provides that permits may be granted
only to "newspapers having general
circulation throughout the City." This
is precisely the sort of content
discrimination condemned by this Court
in Arkansas Writer's Project, Inc. v.
Ragland, 107 S.Ct. 1722 (1987); Minne-
apolis Star v. Minnesota Commissioner
of Revenue, 460 U.S. 575 (1983);
Grosjean v. American Press Co., Inc.,
297 U.S. 233 (1936).

The unbridled discretion granted to
the Mayor, City Council and
Architectural Board of Review by the
City of Lakewood ordinance empowers them
to reward favored newspapers and impose
burdensome conditions on those
newspapers that insist on exposing local

corruption or indorsing political challengers to the incumbent office holders.

Wholly discretionary architectural review of newsracks by local political appointees threatens more harm than the imposition of conflicting requirements by differing municipalities. The threat to newspaper content by means of the subterfuge of standardless newsrack design review is a potent weapon for censorship.

III. THE STREETS AND SIDEWALKS
CONSTITUTE A QUINTESSENTIAL
PUBLIC FORUM AND THIS
ORDINANCE IS NOT A REASONABLE
TIME, PLACE AND MANNER
REGULATION.

In this case it is respectfully submitted that the unbridled discretion vested in the Mayor, City Council and

Architectural Board of Review to grant or deny a permit to place a newsrack on the public sidewalks, a quintessential public forum, disables the City of Lakewood from meeting the most basic requirements that its ordinance be content-neutral, narrowly tailored and leave open ample alternative means of communication.

A. The Streets and Sidewalks Are
A Quintessential Public Forum
Where First Amendment
Activities Cannot be Prohibited
But Only Narrowly Regulated

Fifty years of settled jurisprudence established that a governmental entity cannot totally prohibit the use of its streets and sidewalks for first amendment activities solely on the basis of the fact that title to the property is held by the government. See, e.g.,

Marsh v. Alabama, 326 U.S. 501, 504 (1946); Jamison v. Texas, 318 U.S. 413, 415-16 (1943); Lovell v. City of Griffith, 303 U.S. 444 (1938). Indeed, the "streets are natural and proper places for the dissemination of information and opinion." Schneider v. State, 308 U.S. 147, 163 (1939). See also United States v. Grace, 461 U.S. 171 (1983) (sidewalks). "In these quintessential public forums, the government may not prohibit all communicative activity." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

The proper judicial philosophy was stated by Justice Roberts in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-16 (1939):

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; ...but it must not, in the guise of regulation, be abridged or denied.

The late Harry Kalven, Jr., who coined the phrase "public forum", recognized that the Bill of Rights thus created a "First Amendment easement". Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1, 13. See also Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233. It is thus idle to argue that newspapers

have no right of access to the public streets and sidewalks to distribute news and information because they lack a property interest in public property. Like all persons engaged in speech-related activities, the press has a liberty interest, a "First Amendment easement".²

"[T]he generosity and empathy with which such facilities [streets and parks] are made available is an index of freedom." Kalven, supra at 12. Sensitive to this fundamental precept this Court has enunciated a stringent standard of review for governmental regulations of first amendment

²Even if newsracks permanently occupied space on public property, which they do not, this Court has already recognized a claim for access to first amendment activities having a much greater degree of permanency. See City of Los Angeles v. Preferred Communications, Inc., 106 S.Ct. 2034 (1986) (cable television wiring).

activities occurring on the public streets and sidewalks:

In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

United States v. Grace, 461 U.S. 171, 177 (1983), quoting Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).³

In any event, it is incumbent upon the City of Lakewood to bear the burden

³Since the City of Lakewood has, by virtue of Section 901.181 of the Lakewood Codified Ordinances, opened its sidewalks to newsracks, the sidewalks also constitute a designated public forum. The same constitutional standards are applicable to both quintessential and designated public forums. See Perry Education Association, supra, at 45-46; Widmar v. Vincent, 454 U.S. 263 (1981).

of proof that its regulation is narrowly tailored to serve a significant government interest and that ample alternative channels of communication are left open. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 72-73 (1981); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Talley v. California, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring). See also City of Watseka v. Illinois Public Action Council, 107 S.Ct. 1389 (1987).

B. The Lakewood Ordinance Is Not Narrowly Tailored to Serve Significant Governmental Interests

Two governmental interests in the regulation of newsracks now are being asserted: the protection of the public safety from newsracks and the esthetic

harm that newsracks might cause under some circumstances. It is significant that there is no indication in the record that either of these concerns actually motivated the City of Lakewood in its enactment of the challenged ordinance. Indeed, at trial each and every city official testified that he was not consulted about these concerns until after the ordinance was enacted. (JA 111, 126, 137, 147).

Most of the safety hazards attributed to newsracks are equally created by the concededly permissible presence of human news vendors, or indeed mere pedestrians, on the sidewalks of the City of Lakewood. Thus, the danger that a motorist may stop to purchase a newspaper or pamphlet exists regardless of whether the vendor

is animate or inanimate.⁴ Furthermore, this Court has long held that the proper remedy for such hazards is the enforcement of applicable criminal statutes, not overbroad restraints on the first amendment activity. See, e.g., Talley v. California, 362 U.S. 60, 63-64 (1960); Martin v. City of Struthers, 319 U.S. 141, 147-48 (1943); Schneider v. State, 308 U.S. 147 (1939).

Similarly, the possibility that pedestrians or motorists might run into newsracks and thereby cause injury to themselves or third persons exists regardless of whether the vendor of the newspaper is a newsrack or a human being. While accidents involving pedestrians are commonplace; in fact,

⁴The only testimony of such occurrences in the record were in residential areas where newsracks are totally prohibited by Section 901.181 of the Lakewood Codified Ordinances.

there are no reported incidents of anyone being injured by striking or being struck by a Plain Dealer newsrack. Indeed, newsracks are much safer than human news vendors because they are incapable of volitionally causing harm.

Simply stated, the fundamental flaw in the asserted safety justifications for the regulation of newsracks is that they would not justify similar regulations of human news vendors and, thus, should not be permitted to inhibit the utilization of the less drastic alternative of newsracks.

It has not been suggested that newsracks are per se esthetically unpleasing. Instead, the argument is that under certain circumstances and conditions they may have an esthetically unpleasing effect. The short answer to

this argument is that the municipality certainly is empowered to regulate the circumstances and conditions in order to eliminate any potential esthetic harm, provided that it does so by means of narrowly tailored content-neutral time, place and manner regulations. This the City of Lakewood wholly failed to do.

This case emphasizes the wisdom of the observation made in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981): "Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." Here, the City of Lakewood has not enacted a content-neutral time, place or manner regulation but instead has vested unbridled discretion in a

politically appointed Architectural Board of Review controlled by political functionaries who have no training or experience in art or architecture (JA 108) and has provided no standards to guide the exercise of their authority (JA 111, 114).

Nothing in City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) is contrary to the position of amicus here. First, this is not a case where there is no "hint of bias or censorship in the City's enactment or enforcement of this ordinance." Id. at 804. Second, it has been historically recognized that the use of the city sidewalks to distribute the daily newspaper "is a uniquely valuable or important mode of communication." Id. at 812. Finally, the utility poles in Taxpayers for Vincent were explicitly

held not to be traditional, quintessential public forums. In contrast, the law is settled that in a quintessential public forum "[t]he First Amendment requires that we tolerate a certain amount of speech in forms that are not soothing to the ear or pleasing to the eye." Cohen v. California, 403 U.S. 15, 21, 24-25 (1971).

C. The Lakewood Ordinance
Fails to Leave Open
Adequate Alternative Means
of Communication

Adhering to virtually fifty years of settled jurisprudence, this Court has never denied a traditional mode of communication access to the streets or sidewalks, quintessential public forums, on the ground that there existed alternative means of communication. Instead, this Court has properly adhered to the wisdom of Schneider v. State, 308 U.S. 147, 163 (1939):

[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

See also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981); L. Tribe, American Constitutional Law 689

(1978).⁵

If this established doctrine is to be abandoned, the City of Lakewood must bear an extraordinarily heavy burden of proof that the challenged ordinance in fact leaves open adequate alternative means of communication. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 72-73 (1981); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93, 95 (1977); Talley v. California, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring).

The alternative channels of communication suggested by the City of Lakewood, the existence of newsracks on private property and in private

⁵ Similarly, the paramount right to receive information may not be denied on the ground that there are alternative means to receive it. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 757 n. 15 (1976).

businesses which sell newspapers within the city limits, simply are not adequate alternative means of distribution and receipt of daily newspapers. All of the suggested alternative sites are located on private, not public, property. Thus, the municipality's contention is directly contrary to this Court's doctrine that private property is not to be considered an adequate alternative to a public forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). There is a sound rationale for this doctrine. Private property owners are not subject to constitutional constraints and are free to deny access to newsracks at any time and on any basis, including ideological disagreement with a newspaper's editorial policy.

The placement of newsracks on private premises, inside commercial establishments in the business of selling other types of goods and services, is not an adequate alternative means of communication for the further reason that at such locations the newspapers are "less likely to reach persons not deliberately seeking [such] information." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977).

In Kovacs v. Cooper, 336 U.S. 77, 87 (1949), this Court held: "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention." The fundamental flaw in the City's argument is that the ordinance allows the removal of newsracks from

public places with high pedestrian traffic where newspaper headlines have an opportunity to win the attention of busy pedestrians and relegates them to the inside of commercial establishments where persons must actively seek them out. This the Constitution forbids. In this regard it is significant that the witness called by the City of Lakewood to establish the presence of commercial establishments which sell the Plain Dealer newspaper testified that he made the trip to such establishments less than once a week (JA 133).

Finally, the suggested means of communication impermissibly "involve more cost and less autonomy" than the placement of newsracks on public sidewalks. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977).

"[A]n informed public is the essence of working democracy." Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575, 585 (1983). Untailored restraints on the most effective means of single-copy newspaper distribution are contrary to the compelling public necessity for an informed citizenry. To the extent that the Lakewood ordinance threatens to undermine "informed public opinion" it removes "the most potent of all restraints upon misgovernment." Grosjean v. American Press Co., Inc. 297 U.S. 233, 250 (1936).

IV. THE INDEMNIFICATION AND INSURANCE REQUIREMENTS CONTAINED IN THE LAKEWOOD ORDINANCE ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED IN THIS CASE

Section 901.181(c)(5) provides:

(5) the permittee shall save and hold the City of Lakewood harmless from any and all liability for any reason whatsoever occasioned upon the installation and use of each newspaper dispensing device and shall furnish, at permittee's expense, such public liability insurance as will protect permittee and the City from all claims for damage to property or bodily injury, including death, which may arise from the operation under the permit or in connection therewith and such policy shall name the City of Lakewood as an additional insured, shall be in an amount not less than One Hundred Thousand Dollars (\$100,000) combined single limit for any injury to persons and/or damaged property, and shall provide that the insurance coverage shall not be cancelled or reduced by the insurance carrier without thirty (30) days prior written notice to the City. A certificate of such insurance shall be provided to the City and maintained before and during the installation of such devices;

The "hold harmless" and insurance provisions of the Lakewood ordinance are patently unconstitutional because they violate the fundamental principle that

the government may not impose selective financial burdens only on first amendment activities while not placing identical burdens on other similar activities. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722, 1726-27 (1987); Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936). In this case the ordinance on its face imposes "hold harmless" and insurance requirements solely on newsracks. Since there is no evidence in the record that the City of Lakewood imposes similar financial burdens on public telephone booths and bus shelters, the challenged ordinance cannot withstand constitutional scrutiny. See Goldberger, A Reconsideration of Cox v. New Hampshire: Can

Demonstrators Be Required to Pay the Costs of Using America's Public Forums?, 62 Texas L. Rev. 403, 447-48 (1983).

The "hold harmless" provision of the Lakewood ordinance, if taken at face value, is unconstitutional because it would require the Plain Dealer to assume financial liability for tortious conduct by third persons, including municipal officials, involving newsracks even in the absence of any tortious conduct attributable to the Plain Dealer Publishing Company. This result is foreclosed by this Court's decision in NAACP v. Clairborne Hardware, 458 U.S. 886 (1982). Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). See generally Goldberger, supra at 445-46; Neisser, Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas, 74 Geo. L. J. 257, 295-96 (1985).

The requirement that the Plain Dealer Publishing Company obtain a public liability Insurance policy in an amount not less than one hundred thousand dollars (\$100,000) is unconstitutional as applied to the appellee in this case. Indeed, the requirement is arbitrary and capricious. It is undisputed that the Plain Dealer Publishing Company has used newsracks since the early 1970's without a single incident of personal injury. Indeed, no reported decision has ever found tort liability against a newspaper company arising out of the use of newsracks in a public forum. Thus, the City of Lakewood is requiring insurance for a risk that is non-existent. Moreover, the insurance requirement bears no relationship to the purpose of assuring the existence of sufficient funds to pay

for any harm caused by the newsracks since the Plain Dealer Publishing Company has assets far in excess of the amount of the required insurance coverage. Most significantly, there is simply no risk to insure against because section 723.01 of the Ohio Revised Code provides that no tort liability may be imposed upon a municipality unless notice of a dangerous condition is received by the municipality and the municipality fails to take reasonable measures to eliminate the condition. Thus, until such time as such a notice as to a particular newsrack is received by the City of Lakewood, it is absolutely immune from tort liability. Riley v. City of Cincinnati, 46 Ohio St. 2d 287 (1976). Surely the first amendment cannot tolerate the burdensome imposition of a requirement that the

press insure a municipality against risks that, as a matter of law, are nonexistent.

Finally, the Lakewood ordinance imposes a uniform insurance requirement without regard to the hazards posed by the particular location of a newsrack, or indeed, the number of newsracks maintained by a single publisher. A fatal vice of the ordinance, then, is that it imposes a financial burden analogous to the "flat tax" condemned by this Court in Murdock v. Pennsylvania, 319 U.S. 105 (1943).

Lower courts have uniformly invalidated municipally-imposed insurance requirements as a precondition for the use of the public forum for first amendment activities. See, e.g., Plain Dealer Publishing Co. v. City of Lakewood, 794 F.2d 1139 (6th Cir. 1986);

Eastern Connecticut Citizens Action

Group v. Powers, 723 F.2d 1050, 1056-57 (2d Cir. 1983); Collin v. Smith, 578 F.2d 1197, 1207-09 (7th Cir. 1978); Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648 (Sup. Ct. 1972). These decisions are soundly grounded in first amendment principles.

In Murdock v. Pennsylvania, 319 U.S. at 115-16, this Court observed:

Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

A principal vice of conditioning access to the public forum on the purchase of private insurance is that

there is no inhibition on content-based discrimination by private insurance companies. Insurance requirements thus permit municipalities to discriminate indirectly against politically unpopular speakers and impose the economic burden of the risk of a hostile audience on such groups. In brief, insurance requirements pose a grave danger to the uninhibited public expression that it is the core purpose of the first amendment to promote.

This Court has long espoused the principle that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 296 (1981), quoting Buckley v.

Valo, 424 U.S. 1, 48-49 (1976). See also Murdock v. Pennsylvania, 319 U.S. 105, 111-113 (1943). Cf. Lubin v. Parish, 415 U.S. 709 (1974) (candidacy filing fees); Harper v. Virginia Board of Elections, 393 U.S. 663 (1966) (voting). It must be recognized that insurance requirements, such as that imposed by the City of Lakewood, would foreclose the public forum to new publications unable to secure insurance coverage and to unpopular and poorly financed organizations unable to afford

such insurance.⁶ There is special merit in preserving the streets and sidewalks as the "poor man's printing press." Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1, 30.

⁶This Court has never before confronted the question whether a municipality may condition access to a quintessential public forum, the streets and sidewalks, upon a requirement that a speaker agree to hold harmless the municipality and obtain a general liability policy. Under these circumstances amicus would urge this Court to address the narrow question of the constitutionality of this particular ordinance as applied to the facts of this case.

CONCLUSION

Amicus respectfully requests this Court to affirm the decision of the court below. The unbroken precedent of this Court over the last fifty years has established that the dissemination of news and information on the public streets and sidewalks is entitled to the highest first amendment protection and may not be subject to the unbridled, censorious discretion of municipal officials. An informed citizenry is the cornerstone of our democracy. Any attempt to inhibit the public flow of information ~~undermines~~ our very system of government. Similarly, unnecessary and burdensome insurance requirements should not be permitted to accomplish indirectly that which would be constitutionally intolerable if done directly.

Respectfully submitted,

OF COUNSEL:	STEPHEN W. CARD
John A. Powell	Member of the Ohio Bar
Steven R. Shapiro	
David B. Goldstein	Gordon J. Beggs
American Civil	Counsel of Record
Liberties Union	American Civil
132 West 43rd St.	Liberties Union
New York, NY 10036	of Cleveland
(212) 944-9800	Foundation
	1223 W. Sixth St.
Bruce A. Campbell	Cleveland, OH 44113
American Civil	(216) 781-6276
Liberties Union	Counsel for Amicus*
of Ohio Foundation	
360 South Third St.	
Suite 150	
Columbus, OH 43215	
Paul L. Hoffman	
American Civil	
Liberties Union	
Foundation of	
Southern California	
633 So. Shatto Place	
Los Angeles, CA 90005	
(213) 487-1720	

* Counsel for amicus gratefully acknowledge the assistance of Carol Barmann, Susan Greene, and Kevin Spellacy, students at the Cleveland-Marshall College of Law.